Palagonia Bakery Company, Inc. *and* Local 348-S, United Food & Commercial Workers International Union, AFL–CIO, CLC. Cases 29–CA–23632, 29–CA–23666, 29–CA–23693, 29–CA–23700, 29–CA–23746, 29–CA–23831, 29–CA–23784, and 29–RC–9507

July 10, 2003

DECISION, DIRECTION, AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND ACOSTA

On November 2, 2001, Administrative Law Judge Steven Fish issued the attached decision. The Union filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority to a three-member panel.

The Board has considered the decision and record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 29 shall, within 14 days from the date of this Decision Direction and Order, open and count the ballots of Mario Arroyave, Leonard Pitter, Frank Sigismondi, Alexander Justi, and Gibbs Saintvil. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Palagonia Bakery Company, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Richard Bock, Esq. and *Rachel Zweighaft, Esq.,* for the General Counsel.

Richard Greenberg, Esq. (Jackson, Lewis, Schnitzler & Krupman), of New York, New York, for the Respondent.

Warren Mangan, Esq. (O'Connor & Mangan), of Long Island City, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to various charges filed by Local 348-S United Food & Commercial Workers Union, AFL–CIO (the Union or Local 348), the Regional Director for Region 29, issued a series of complaints, culminating in a second further order consolidating cases, consolidated amended complaint and notice of hearing, on November 2, 2000,[1] alleging that Palagonia Bakery Company, Inc. (Respondent) violated Section 8(a)(1) and (3) of the Act, as well as, ordering a consolidated hearing with Case 29–RC–9507, which involved objections by both parties, as well as seven determinative challenges. The trial with respect to the allegations in the above-mentioned complaint, plus the issues in the representation case was, held before me on February 28, March 2, 8, and 9, 2001. During the trial, the General Counsel amended the complaint to allege two additional violations of the Act. Briefs have been filed[2] and have been carefully considered based upon the entire record,[3] including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent, a corporation, with its principal office and place of business at 508 Junius Street, Brooklyn, New York, has been engaged in the wholesale sale and distribution of baked goods.

During the past year, Respondent purchased and received at its Brooklyn, New York facility goods and materials valued in excess of $50,000 directly from suppliers located within the State of New York, which entities, in turn, purchased the goods and materials directly from suppliers located outside the State of New York. Respondent, admits, and I so find that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted and I so find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

A. The CA Cases

Respondent is a business owned and operated by the Palagonia family. Christopher Palagonia is the president who is essentially in charge of the production functions of the bakery, and is more or less a "working president." Joseph Palagonia, Christopher's cousin, is the general manager, who oversees the general operations of the Company, including administrative and personnel functions. Two other Palagonia's, Anthony and Richard, are admitted supervisors of Respondent in charge of various aspects of the operation. Another admitted supervisor of Respondent is Signorino DiBua, who is in direct charge of production from 10 a.m. to 8:30 p.m.

The record reflects that in July 1991, as a result of a petition filed by the Union, an election was conducted amongst Respondent's employees. While the results demonstrated that a

[1] In the absence of exceptions, we adopt the judge's unfair labor practice and election objection findings. We find no merit in the Union's exceptions to the judge's findings that Mario Arroyave, Leonard Pitter, Frank Sigismondi, Alexander Justi, and Gibbs Saintvil are not statutory supervisors.

[1] All dates hereinafter are in 2000 unless otherwise indicated.

[2] The General Counsel subsequent to the close of the trial, made a motion to reopen the record to include two documents in the formal papers which had been inadvertently left out. This motion which was not opposed by any party is granted.

[3] The General Counsel's posttrial motion to correct the transcript, which was not opposed by any party, is granted. [Certain errors in the transcript have been noted and corrected.]

majority of voters had selected the Union to represent them, Respondent thereafter filed timely objections to the election, alleging certain objectionable conduct by representatives of the Union.

On September 29, 1991, following an administrative investigation, the Regional Director issued a report, directing a hearing on one of Respondent's objections. Thereafter, a hearing was held before a hearing officer of the Board concerning the issues raise by the objections. The hearing officer issued his decision on January 24, 1992, in which he discredited Respondent's witnesses, including Joseph and Christopher Palagonia and recommended that the objections be dismissed and the Union certified. No exceptions were filed to the hearing officer's recommendation. Therefore, on February 18, 1992, the Board overruled Respondent's objections, and certified the Union as the collective-bargaining representative for Respondent's employees.

The record does not reflect what transpired from 1992 through 2000, vis-à-vis the relationship between Respondent and the Union, except that it does not appear that the parties ever reached a collective-bargaining agreement. The record suggests, although is not clear, that at some point thereafter, the Union ceased its representation of Respondent's employees, since it started to organize again in 2000.

Meanwhile, on July 19, 1997, a different Union, Local 3 of the Bakery and Confectionery Workers filed a petition to represent Respondent's employees. Thereafter, on August 29, 1997, an election was held, resulting in votes of 32 yes, 71 no, and 3 challenges. Local 3 filed objections to the election, which after an investigation by the Region, resulted in a report recommending that the objections be dismissed and a certification of results be issued. No exceptions were filed to the Regional Director's report, so the Board consequently issued a Certification of Results on October 24, 1997.

In early June of 2000, porters Nelson Polanco and Andres Veras contacted Jose Merced, an organizer for the Union, to discuss representation by the Union of Respondent's employees. Pursuant thereto, a meeting was held at Polanco's home on June 10, with Merced and several other employees. Polanco and Veras signed authorization cards for the Union on that day, and Merced gave them blank authorization cards to distribute to Respondent's employees. Thereafter, Veras and Polanco distributed authorization cards to employees during lunch hour, and returned signed authorization cards to Merced. Subsequently, the employees regularly held meetings at Polanco's house, once or twice a week.

On June 19, the Union sent a telegram to Respondent asserting that it represented a majority of employees, and demanding recognition. On the same date, the Union filed a petition in Case 29–RC–9507, and sent a fax to Respondent with a copy of its demand for recognition.

Andres Gonzalez who was employed by Respondent as a consultant, performing accounting functions, credibly testified that he delivered the fax from the Union to Chris Palagonia in the presence of Joseph Palagonia. After Gonzalez left the office, he overheard Chris Palagonia say to Joseph, "I can't believe they're doing this to me."

A few minutes later, Gonzalez heard employee Ivan Diarrio (known as Paiser) summoned to the office over the loudspeaker into the office. Gonzalez heard both Joseph and Chris Palagonia ask Diarrio if he knew anything about forming a Union? Diarrio denied that he knew anything about the Union. The Palagonia's persisted in asking him about it, and Diarrio continued to deny any knowledge of the Union. Other parts of the conversation, Gonzalez could not hear.

Immediately after this conversation, the Palagonia's called Gonzalez into the office. They directed Gonzalez to bring them the passport of employee Efraim Bolwar Espinoza, an employee to whom Gonzalez had previously provided assistance in securing his job with Respondent. Chris Palagonia informed Gonzalez that he believed that Espinoza was the person who was organizing the Union. Later that day Gonzalez confronted Diarrio, since based on the above facts, he suspected that Diarrio may have told the Palagonia's that Espinoza was organizing. Gonzalez asked Diarrio if he had told the Palagonia's that Espinoza was the union organizer? Diarrio denied that he had so informed them, but confirmed what Gonzalez himself had overheard—that the Palagonia's had questioned him about what he knew about union organizing, but he had denied knowing anything.

Also in late June, after employee Emilio Peralta had been talked to about the Union by Polanco and attended a union meeting at Polanco's house, he was approached while working by Supervisor Signorino DiBua. DiBua asked Peralta who had formed the committee of the Union? Peralta replied that he did not know who had formed it, but that he agreed with the Union 100 percent. The very next day, Peralta was confronted by Chris Palagonia, who asked Peralta why he was against the Company? Peralta made no response and walked away. About a week later, Chris Palagonia again asked Peralta why he was against the Company, since he was working for the Company? Peralta made no response. Palagonia then informed Peralta that if he voted against the Union, he would get "all the benefits that you get from the company." However, he added that if the Union wins the Company wouldn't be able to give Peralta all the benefits that he would get if the Union doesn't win.

On June 22, Chris Palagonia approached Veras near the large oven. Palagonia began yelling at Veras that he was trying to organize for the Union, and get the coworkers into the Union, and called Veras an "unhappy motherfucker." Veras admitted that he was one of the organizers for the Union. Palagonia responded that Veras was "not good for the company," and "he was really bad for the company."

The next day, June 23, Chris Palagonia summoned Veras into his office. Palagonia asked Veras what is it that he wanted to stop organizing the workers, cash or a salary raise? Veras declined the offer, stating that what he wanted was a contract for all the workers. Palagonia suggested that Veras think about it. Veras answered no, and the conversation ended.

The next day, June 24, Chris Palagonia was waiting for Veras outside the premises as Veras arrived for work. Palagonia asked Veras if he was going to accept the offer that Palagonia had made to him the day before. Again Veras replied no, and Palagonia said to think about it. Veras returned to work.

On June 23, a union meeting was scheduled at 7:30 p.m. at the home of Polanco. Polanco picked up several employees, including Veras in order to drive them to the meeting at his home. He also drove another employee, Marina to her house. While he was driving, Polanco noticed that a wine colored jeep driven by Joseph Palagonia appeared to be following him.[4] Polanco first noticed Palagonia when he was on Elderts Lane as he was about to drop off Marina. After dropping off Marina, Polanco passed Palagonia, and noticed that Palagonia made a U-turn and hid behind another vehicle. Polanco then mentioned to Veras, "[L]ook, Andres, Joey is there." Polanco continued driving and Palagonia continue to follow him. Polanco then decided to drop off two employees at the train station, and instructed them to go to his house by train. Palagonia stopped while Polanco left the two people on the train. When Polanco proceeded to drive into Fulton Street, Palagonia continued to follow him. When Polanco reached Logan Street, he lost Palagonia and did not see him any more.

Sometime during the month of June, Chris Palagonia approached employee Wilner Desgraves in the cafeteria. Palagonia told Desgraves that if he gave Respondent his help by voting for Respondent, Desgraves would receive a 50-cent raise. Later on in June, Desgraves was spoken to in Chris Palagonia's office, in the presence of Gibbs Saintvil a "manager," according to Desgraves. Palagonia on this occasion told Desgraves that he would receive a 50-cent raise, provided that he voted for Respondent and if he convinced other Haitian employees to do the same.

During the day immediately after Respondent received the fax from the Union demanding recognition, Gonzalez noticed numerous "supervisors" being called into the office, including DiBua, Richard Palagonia, and Mario Arroyave. During the week of June 19, Arroyave departed from the Palagonia's office and asked Gonzalez for a spreadsheet of all porters, including their names, identification numbers, and rates of pay and days off. Arroyave took the list and walked back into the office. Gonzalez overheard Chris Palagonia say to Arroyave, "[Y]ou have to give them the raise, but first tell them this." At that point Palagonia slammed the door so Gonzalez could not hear the rest of Chris' instructions to Arrvoyave.

Shortly thereafter, Arroyave returned the list to Gonzalez, with handwritten notes from Chris Palagonia. The list directed 25-cent raises for a number of porters, but no raises for Polanco or Veras, who were also porters. Gonzalez processed the raises in Respondent's computer, but gave raises of 50 cents to employees Sanchez, Torres, Bencosme, and Araujo, and 25-cent raises to employees Britt and Charles, all starting with the payroll period ending June 24.

On June 26, Chris Palagonia asked Gonzalez if he had given some employees a 50-cent raise and some a 25-cent raise. After checking in the computer, Gonzalez conceded that he had in fact given some employees 50-cent and others 25-cent raise. Palagonia admonished Gonzalez that he didn't have the money to be giving out such raises, and that Gonzalez had made an error. Palagonia added that this was not his plan. It was supposed to have been 25 cents now and another 25 cents after the election.

Respondent's witnesses, Chris and Joseph Palagonia, testified that the raises were given to the employees pursuant to a promise made by Chris Palagonia to the employees in September 1999, that if it was successful in obtaining a contract from the New York City Board of Education, they would receive a raise. Chris Palagonia further testified that he did not tell the employees when or how much of a raise they would receive. However, the record discloses that Respondent did not secure the contract until August 14. Chris Palagonia in an attempt to explain this discrepancy, explained that as early as March or April he believed that Respondent would obtain the contract, since it had passed a Board inspection and was given permission to bid.[5] Nonetheless, Palagonia did not give the raises in April. According to Chris Palagonia, Respondent did not give the raises in April for financial reasons, but he was able to give the raises in late June, because the new machines that Respondent had bought were working better, and Respondent was financially able to afford the raise in late June. No records were introduced to substantiate Palagonia's testimony in this regard. Nor did Palagonia testify as to why he did not give raises to Polanco or Veras, who were also, porters, and were doing the same work as the employees who received raises.

Polanco, in early June, received permission directly from Chris Palagonia to take a 5-week vacation starting on June 28, and returning on August 4. Initially, Richie Palagonia told Polanco that he could not go at that time, but then Chris Palagonia came to Polanco and told him that there was no problem. Nothing was said to Polanco about whether there would be a job for him when he returned only if there was work for him.

However, prior to June 27, Polanco had been informed by a coworker that if he took his vacation as scheduled, he would be fired. Thus, although he accepted his vacation check on June 27 as scheduled, he decided not to go on vacation at that time. On June 28, when Polanco appeared for work, Richie Palagonia asked what he was doing there, he was supposed to be on vacation. Polanco replied that he could not go because he had financial problems. Palagonia insisted that Polanco was on vacation and ordered him to punch out. Polanco refused. Palagonia then went to get Chris Palagonia. Chris began yelling at Polanco, called him a "motherfucker," and accused Polanco of being the one to bring in the Union.

Several days later, Chris Palagonia approached Polanco by the foyer area of the plant. He placed his hand on Polanco's shoulder, and promised him a raise and a 2-week vacation, if Polanco told the Union that the employees don't want them here anymore. Chris added that Respondent would give him more than with the Union, and asked Polanco to tell the other employees that the Union will not help the employees. Polanco replied that Palagonia had promised him a raise and benefits the

[4] Polanco did not see anyone else in the vehicle with Palagonia.

[5] The record reveals that on March 14, Respondent was notified that the previous bar on its right to bid on Board of Education contracts was terminated. On March 28, Respondent submitted a bid for a contract, and on March 31, the Board notified Respondent that its bid has been considered.

last time a union was organizing, if he spoke to other employees on behalf of the Respondent, and no raise was forthcoming.[6]

Palagonia responded that the Respondent didn't have the money to give a raise at that time. Chris Palagonia repeated his promise of a raise and 2 weeks paid vacation, if Polanco spoke to the workers and convinced them to abandon the Union. Chris asked Polanco if he was going to do so, and he said yes and they shook hands.

Sometime in July, Joseph Palagonia approached Polanco in the production area. Palagonia told Polanco that he did not want a Union, and asked Polanco why the employees wanted a Union? Polanco replied that the employees wanted benefits and medical insurance, and respect from Richie Palagonia. Joseph Palagonia replied that he would be speaking to Richie about respect for employees.

Chris Palagonia also told Veras and other employees at, various times, that if they voted for the Union, Respondent would close the Company and the employees would have to go on strike.

The election was scheduled for July 28. Prior thereto, Respondent held several preelection meetings of employees in groups, to discuss the election. However, neither Polanco nor Veras were invited to attend any of these meetings. Joseph Palagonia conducted the meetings on behalf of Respondent. At one of the meetings, attended by employee Emilio Peralta and five other employees, Joseph Palagonia told the employees that if they vote for the Union, they would lose their money, because the money the Union makes, comes from the employees. Peralta spoke and asked why Respondent didn't give the employees medical insurance, and other benefits offered by the Union. After the meeting, Chris Palagonia, who was present at the meeting spoke to Peralta at his machine. Palagonia asked Peralta not to vote for the Union and added that if he was against the Union, Respondent would give him all the benefits that Respondent offers. Palagonia also told Peralta that if the Union wins the election, the "company is going to fail," and that "we're going to have problems."

Desgraves also attended one of Respondent's preelection meetings. At this meeting both Joseph and Christopher spoke and six employees plus Saintvil were present. Chris Palagonia promised all the workers who were there a 50-cent raise, if they voted for Respondent. Joseph Palagonia said that the Union will not do anything "serious" for the employees, they will take $35 from employees checks, and they are driving nice cars. Palagonia added that "the door is open for you, if you vote for the Union, you close the door."

A week later, at the timecard, Richie Palagonia told Desgraves to vote for Respondent and to convince all the Haitians to vote for the Respondent.

Veras, Polanco, and Desgraves wore union hats and shirts prior to the July 28 election, and distributed prounion leaflets to employees on the premises in the cafeteria or the lockerroom. They were seen by various supervisors engaging in this conduct. On July 22, DiBua saw Veras distributing pamphlets in the cafeteria. DiBua told Veras that he could not give out the leaflets on company premises. Veras replied that he could do so, because the law says that during his breaktime and lunchtime, he can give out leaflets and talk to his coworkers. DiBua told him that he could only give out the leaflets on the street. On July 26, 2 days before the election, Desgraves handed out flyers to employees during lunch hour in the cafeteria at12 noon. Desgraves handed one of the flyers to Chris Palagonia, in the presence of Joseph Palagonia. Chris Palagonia spit on the flyer.

The next day, July 27, the day before the election, Desgraves was approached by DiBua at 11 a.m., and told to eat lunch at 11 a.m. that day. This was the first and only time that he was told to eat lunch at 11 a.m. His normal lunch began at 12 noon, wherein he would normally go to lunch with the other Haitian employees, and would sit with them in a section of the cafeteria. On July 27, DiBua instructed Saintvil to eat with Desgraves on that day. Saintvil, was a "supervisor" according to Desgraves, and had been campaigning against the Union. The next day, July 28, the day of the election, Desgraves was the union observer. On July 29, the day after the election, and all subsequent days, Desgraves was permitted to have his lunch at the normal hour beginning at 12 noon.

On one of the days that Respondent conducted its campaign meetings with employees, Richie Palagonia directed Polanco to have lunch at 12 noon, instead of 12:30 p.m., his normal lunch hour. Thus, Polanco could not have lunch with his normal lunch companion. From that point on, until Polanco eventually went on vacation, starting August 7, Polanco's lunch hour continued to start at 12:30 p.m.

Palanco testified that after he began to organize for the Union, Richie Palagonia began to follow him everywhere. According to Polanco, Palagonia would follow him when he went upstairs to change or if he wanted to talk to another employee. Polanco also asserts that when he would take a break for lunch or changed clothes, he would be followed and observed by Chris, Richard, or Joe Palagonia.[7]

Veras also testified, without contradiction from Chris Palagonia, that after he began to organize, Palagonia was constantly "yelling at him." Prior to Veras' organizational activities, Chris Palagonia did not yell at him.

As related above, the election was held on July 28, which resulted in determinative challenges, as well as objections filed by both Respondent and the Union. While these matters were pending, Respondent terminated both Veras and Polanco in August and September respectively.[8] On October 26, after the issuance of the Regional Director's report, 3 challenges were opened, resulting still in an indeterminate election, and the

[6] Polanco was referring to July 1997, when Local 3 filed a petition to represent Respondent's employees. At that time, Chris Palagonia asked him to talk to other employees and tell them that the union people were "thieves," and offered him a raise and benefits if he did so. Polanco agreed, but never received the promised raise, although he had spoken to employees as promised.

[7] All three Palagonia's denied supervising any employees closely at any time.

[8] The facts relating to these terminations will be detailed below.

instant hearing directed with respect to the remaining challenges and the objections.

After the election, Desgraves testified that Respondent "abused" him, by assigning him to work in a hot oven, and then immediately assigning him to go to the freezer. Prior to the election, he had not been assigned to work on the oven, so therefore had not been compelled to go to the freezer immediately after working on the oven.

Desgraves also testified, without refutation from Chris Palagonia, that after the election, on several occasions, Chris Palagonia yelled at him for punching in 10 or 15 minutes early, accusing him of "stealing time." According to Desgraves, Palagonia had never yelled at him about this problem, prior to the election. On one of these occasions, sometime in November, after yelling at Desgraves for allegedly "stealing time," Chris Palagonia called Desgraves a "slave" and a "fucking piece of shit," in front of several other employees.[9]

On August 24, at about 7:30 p.m., Veras was picking up garbage from the floor near the oven, when he was approached by employee Herman Cera, who asked for his home address. While Cera and Veras were talking, Chris Palagonia came over to the two workers. Chris spoke to Veras, but not Cera. And asked, "[W]hat are you doing talking, you're not working?" Veras did not reply. At that point, Palagonia called Veras a "motherfucker Dominican," and added that he was not working. Again, Veras made no response, at which time, Palagonia took the garbage can, which Veras was on his way to empty, and threw it and a sweeper about 10 feet. Chris Palagonia then told Veras that he was going to the office to look for a camera to take a picture and walked away. Veras then picked up the sweeper and the garbage and went to the yard to throw the garbage out. As Veras was transferring the garbage from the small can to a bigger container, in the yard, Chris Palagonia approached Veras and again called Veras a "motherfucker Dominican." After Veras finished transferring the garbage, as he was walking back from the yard to the plant, Palagonia once more called Veras a "Dominican motherfucker." At that point, Veras asked Palagonia why he was calling Veras a "Domincan motherfucker." Palagonia responded yes and put his hand on Veras' chest.

Veras and Palagonia walked into the plant together and stopped at the oven where Cera was working. Also present were employees Rafael Dominguez and Rubian Hernandez in addition to Cera. As they reached the oven, Palagonia ordered Veras to go back to work. Veras did not reply. Palagonia raised his voice and told Veras to go back to work, "or I will send you home."

At that point, Veras "lost it," and began to curse at Palagonia in English and in Spanish.[10] Veras in English said, "[F]uck you, fuck the bakery, you're a motherfucker." Veras then continued, "[T]he Union is coming soon, we'll see. We'll go to court. I've got the Union." Palagonia said, "[W]e'll see, we'll see," and then speaking to other employees who were present, said, "[L]ook, look at this guy. Look what he's doing, screaming and hollering."

Palagonia then walked away from Veras. Veras then pointed his middle finger at Palagonia, while Palagonia's back was turned. Palagonia did not see this event, but it was apparently reported to him by someone, possibly Supervisor Castiblanco, who also allegedly related to Palagonia the Spanish words used by Veras during the incident.

My findings set forth above concerning the events of August 24, are based on a compilation of the credited testimony of Veras, Palagonia, employees Cera, Ramirez, Dominguez, and Louis Gilberti, a supplier of Respondent who happened to be present on that day. I note that the testimony of the employee witnesses essentially confirm Palagonia's testimony that Veras cursed at him after he told Veras to return to work, and I have so found. However, it is significant that none of these witnesses heard the entire conversation, nor did they hear any conversation between Palagonia and Veras in the yard. In these circumstances, I credit Veras' version of the events preceding his conduct of cursing at and giving the finger to Palagonia.[11] I also rely in part on the failure of Respondent to call as a witness, its supervisor, Jose Castiblanco, who was a witness to the incident, and who allegedly reported to Palagonia on what he had heard and seen. In such circumstances, I find it appropriate to draw an adverse inference that his testimony with respect to this incident would not have favorable to Respondent's case. *United Parcel Co.*, 321 NLRB 300 fn. 1, 308–309 fn. 21 (1996); *Ready Mix Concrete*, 317 NLRB 1140, 1143 fn. 16 (1995); *Basin Frozen Foods*, 307 NLRB 1406, 1417 (1992).

Chris Palagonia further testified that he immediately reported the incident to Joseph Palagonia on the phone. Joseph replied that he would look into the next day. The next day, the Palagonia's met and after again discussing the previous days events, Joseph indicated to Chris that Veras should be fired and Chris agreed. Chris denies that Vera's union affiliation came up during their conversation, but does recall Joseph saying that if Veras was a union supporter, he's probably going to file charges. Thus, Chris asserts that he replied, "[I]f it happens, it happens."

Joseph Palagonia testified that on August 24, his cousin Chris told him about the argument with Veras, and that after being told three or four times to go back to work, Veras exploded, called Chris a "motherfucker" and gave him the finger. Joseph alleges that he asked Chris if he did anything to provoke

[9] My findings above with respect to the various statements made to and actions taken by Respondent's officials with respect to Respondent's employees is based on the mutually corroborative and credible testimony of Peralta, Gonzalez, Desgraves, Veras, and Polanco. I note that Peralta and Desgraves are current employees of Respondent, and not discriminatees. Therefore, their testimony, where adverse to their employers is considered more worthy of belief. *Stanford Realty Associates*, 306 NLRB 1061, 1064 (1992); *Molded Acoustical Products*, 280 NLRB 1394, 1398 (1986). Moreover Gonzalez although no longer employed by Respondent has nothing to gain by testifying against Respondent in this proceeding.

[10] Veras also called Palagonia a name in Spanish which translated means "dummy."

[11] I credit in this regard the testimony of employees Dominguez and Ramariez that Veras gave Palagonia the finger behind his back, so Palagonia could not see it. These findings are contrary to the testimony of Palagonia, who insisted that Veras gave him the finger directly into his chest, and to Veras, who denied that he gave Palagonia the finger at all.

Veras and Chris said no. Joseph asked if there were any witnesses, and Chris replied that there were three employees, plus Supervisor Castiblanco. Joseph contends that he asked Chris why he didn't fire Veras on the spot. Chris allegedly replied that "with all of this stuff with the union," he didn't want to make waves. Joseph replied that he was going to find out what's going on and they would talk the next day. Joseph further testified that he immediately called Castiblanco on the phone, who allegedly confirmed what Chris had told Joseph. Castiblanco also allegedly told Joseph that three employees witnessed the incident. One of the employees, Rubian Ramirez, was there at the time, so Joseph contends that he asked Castiblanco to put Ramirez on the phone. Joseph asserts that Ramirez told him that Veras called Chris a "motherfucker" and cursed at him in Spanish. Joseph then asked Castiblanco if everyone knows that Veras called Chris a "motherfucker," and that Chris walked away. At that point, Joseph asserts that he made up his mind that Veras must be fired. Joseph did not speak to the other employee witnesses about the incident or to Veras to get his version. According to Joseph, there was no need to get Veras' version, because he admitted that he cursed at Chris and everyone in the bakery knew about it. When asked if it might have made a difference, that as Veras testified herein, that Chris cursed at Veras first, Joseph replied that he was "almost positive" that his cousin wouldn't do that.

On the day of the discharge, Joseph contends that after discussing the incident personally with Chris, Joseph said, "I think we should let him go." Chris agreed, although Joseph said that Respondent would probably get charges. After checking with Respondent's attorney, Respondent decided to terminate Veras on that day. While Chris is the cousin and president of the Company and could and has fired people on his own, he generally relies on Joseph in regard to personnel decisions, who as the general manager is entrusted with that authority.

Castiblanco, as noted although a supervisor of Respondent was not called to testify in this proceeding, nor was any explanation given for Respondent's failure to call him as a witness.

Respondent did call several employees witnesses as detailed above, namely Dominguez, Cera, and Ramirez. Respondent's attorney spoke to the employee on September 11, took affidavits from them, and obtained written assurances from the employees, which comply with the *Johnnie's Poultry*, 196 NLRB 770 (1964), safeguards. However, on September 11, prior to employees Cera and Dominguez being interviewed by Respondent's attorney, Chris Palagonia, told both of these employees that they "had" to testify and talk to Respondent's attorneys.

Moreover, on March 8, 2001, the day that these employees testified at the instant trial, the employees met with Respondent's attorneys in a conference room located next door to the hearing room. During that meeting the attorneys did not show the employees or make reference to the documents that they signed on September 11, 2000, which detailed the *Johnnies Poultry* safeguards. They did show the employees their affidavits that they had given on September 11, and discussed the testimony that they were about to give.

Respondent contended in its objections to the election, that employee Desgraves, who was the Union's observer at the election, called Joseph Palagonia a "motherfucker" in the presence of the company observer, the Board agent, and the Board's interpreter. Desgraves was not terminated for this alleged conduct. According to Joseph Palagonia, he chose not to terminate Desgraves, even though Desgraves had called him a "motherfucker" for several reasons. These reasons include Desgraves was not on the payroll at the time, since the comments were made at the election, they were not made in the presence of other employees, other than the company observer, and he was not refusing orders at the time. Thus, in those circumstances, Palagonia testified that he did not think it was fair to fire Desgraves at that time.

Polanco, as noted above had received permission, without qualification, to take his 5-week vacation starting in late June. However, he canceled that request and as also detailed above, after hearing the news that Polanco was not taking his vacation, Chris Palagonia called Polanco a "motherfucker" and accused him of bringing in the Union. Shortly after the July 28 election, Polanco approached Joseph Palagonia, and asked to go on vacation on August 7 and to return on September 8. Palagonia responded that Polanco could go, and when he returns, if there is work, Respondent would give it to him. In this regard, Polanco had been, employed by Respondent for 6 years and every year, he would go on vacation for 6 weeks to Santo Domingo. In each of those prior years, he never had any problems with getting permission to go for 6 weeks, and was never told by any official of Respondent that there would only be a job for him when he returned if there was work available.

Subsequent to Polanco's conversation with Palagonia, Respondent received a letter dated August 2, from the Union's attorney, confirming an alleged oral understanding between Polanco and Respondent that Palanco can be away from Respondent from August 7 and to return on September 8.

Respondent's attorney responded by letter, dated August 3. This letter asserts that no oral understanding was reached with regard to Polanco's "extended leave." It further asserts that when extended leaves are taken, Respondent does not guarantee their jobs. Thus, the letter continues, "consistent with the Bakery's longstanding practice, if Mr. Polanco's job is filled by the time he is ready to return to work on Friday, September 8, 2000, and no other suitable position is available, he will not be returned to work at that time. His return to work would then be contingent upon a suitable position becoming available."

Notwithstanding this response, Polanco went on his vacation, and returned to Respondent on Sunday, September 10. On that date Polanco was informed by Joseph Palagonia that there was no work available for him, and said that he was going to call Polanco on Friday. Palagonia did not tell Polanco to call Respondent to see if there was work available in the future.[12]

Respondent did not call Polanco on Friday as promised, or on any other day. Thereafter Polanco never called Respondent subsequent to September 10 to inquire about work opportunities.

On or about August 21, Respondent hired Osvaldo Garcia to replace Polanco as a porter. According to both Joseph and Richie Palagonia, Respondent needed a replacement for Po-

[12] I credit Polanco over Joseph Palagonia's contrary testimony in this respect.

lanco, and Garcia who had been previously employed by Respondent, had been making inquires about returning to work for Respondent. Both Richard and Joseph Palagonia insist that Respondent's policy had always been that when an employee extends his vacation past Respondent's allowed time, they are permitted to return to work, only if their job has not been filled.[13]

In that regard, Respondent's witnesses concede that this policy was never put in writing, but contend that employees are told about it when they leave for extended vacations, just as Polanco was when he left in August. However, neither Richard nor Joseph Palagonia could dispute Polanco's credited testimony as detailed above, that he was never told about this policy in any prior years.[14] Indeed, Chris Palagonia did not deny Polanco's similar credited testimony that in May when he initially asked to go on vacation starting in late June, Chris granted him permission without any qualification and without indicating that his job might not be available if he returned after 5 weeks.

Joseph Palagonia did not dispute Polanco's testimony that in past years, Respondent always permitted him to return to his job after an extended 5–6-week vacation. Joseph Palagonia did specifically recall in the past of two occasions when Respondent took Polanco back after his extended leave, because there was work available for him. Palagonia could not recall the circumstances that led to the availability of a job for Polanco on the other occasions. He testified that generally Respondent tries to replace everyone who takes a vacation in excess of 1 week, and sometimes it cannot find anyone and sometimes they hire someone who doesn't work out, and sometimes someone else leaves. In 2000, Joseph asserts that Respondent sought to replace Polanco after 2 weeks, and that Richie Palagonia had been contacted previously by Garcia about a job, and Joseph authorized Richie to hire Garcia, which was done on August 21.

Respondent also hired nine other employees subsequent to its refusal to take back Polanco, in such classifications as packers, mechanics and bagel workers. During his 6 years of working for Respondent, Polanco worked in production, on the oven and worked with bagels and rolls. Respondent's witnesses gave no explanation as to why it did not offer, or consider hiring Polanco for any of those positions.

Moreover, as noted above, Veras who was also a porter, was terminated on August 25, and was not replaced. Thus, when Polanco sought to return on September 10, Respondent was still one porter short. Respondent's witnesses provided no explanation as to why it simply did not permit Polanco to replace Veras, rather than tell Polanco that there was no work for him. Nor did Respondent provide any other explanation, such as loss of work or any other reason why it concluded that there was no work for Polanco on September 10.

[13] Richie Palagonia testified that Respondent gives its employees 2 weeks vacation, while Joseph Palagonia contends that Respondent allows 1 week.

[14] Former employee of Respondent Quinonez Buenaventura testified that in 1993, he took a 4-week vacation, was allowed to return to work, and was never told by Respondent prior to leaving, that his return to work would be dependent upon the availability of work.

Joseph Palagonia testified that its treatment of Polanco was consistent with its treatment of several employees. According to Palagonia, in the year 2000, five employees took extended vacations, ranging from 4 to 15 weeks, and in each instance when these employees sought to return to work their request was denied by Respondent, because there was no work available for these employees. Palagonia testified that in connection with the investigation of the instant charges, he looked at Respondent's records, and was able to find on the computer screen the dates that these employees left for vacation and the dates that they requested to return to work and they had been replaced. These records that Palagonia asserts that he looked at in order come up with this information were not introduced into the record. However, Palagonia did testify that he specifically recalled three of the employees mentioned and that they were not given jobs when they sought to return. He also testified that one of these employees Martin Luther, he recalled speaking to personally about the matter before Luther went on vacation. Palagonia contends that he told Luther, who was planning to go to Santo Domingo for 4 or 5 weeks, that if he goes for that long, he "might not have a job" when he comes back. Palagonia further recalls that when Luther returned after 5 weeks, Respondent had nothing available for him and did not permit him to return to work.

The record also reveals that prior to the trial, the General Counsel subpoenaed records that would show the duration of vacations taken by all unit employees for a 3-year period back to 1998. At the start of the trial, Respondent indicated that it did not turn over such records to the General Counsel, because it does not keep records in the form requested. However, upon discussion on the record, on the first day of trial, Respondent conceded that it did have payroll records from which that information could be obtained, and promised to either go through its records and create the document containing the information sought by the General Counsel, or submit to the General Counsel the underlying records which contain the relevant information. Insofar as the record discloses, Respondent never submitted these promised documents to the General Counsel.

B. Case 29–RC–9507

1. The challenges

All of the disputed challenges were made by the Union. Six of the challenges[15] were made on the basis of alleged supervisory status. The seventh challenge, to the ballot of Patricia Palagonia was on the grounds of her special status as a relative of the Palagonia's, her not being in the unit, and her alleged confidential status.

The Union presented a number of witnesses in support of its challenges, who were the same witnesses presented by the General Counsel in the CA cases. As I have described above, I have generally credited their witnesses in the CA cases, and I similarly credit their testimony concerning the challenged voters.

Respondent on the other hand presented no witnesses to directly contradict the testimony of these witnesses concerning

[15] Gibbs Saintvil, Mario Arroyave, Leonard Pitter, Frank (Cheech) Sigismondi, Uriel (Sanchez) Londano, and Alexander Justi.

the alleged supervisory status of the disputed individuals. It merely presented generalized testimony that these individuals did not posses any of the specific indicia set forth in Section 2(11) of the Act, without addressing any of the specific testimony offered by the Union's witnesses.

I therefore credit these witnesses, and find the following facts. Gonzalez, who as related above was employed by Respondent as a consultant to perform accounting functions, was told by Arroyave that he was a maintenance supervisor, by Londono that he was in charge of the morning shift, and by Justi that he was the foreman of the night shift, and by Sigismond, that he was a foreman. Gonzalez also saw some records of Respondent that identified Saintvil as a foreman.

Saintvil punched a timecard, but Londono, Sigismondi, Arroyave, and Justi did not. Gonzalez testified credibly that all of these individuals would initial timecards of employees. In such cases, the initials would be necessary before Gonzalez would be authorized to pay overtime to the employees. Thus, Gonzalez was told by Joseph Palagonia that, it was the direct supervisor's responsibility to initial the overtime for employees, before employees could get paid overtime. Similarly, when the time card machine malfunctions, the employees would initial the employees timecards to authorize payment to these employees.

At various times, Arroyave told Gonzalez that he had recommended to Chris Palagonia that certain employees receive raises. However, the raises were not given until the 25–50-cent raises given to employees in June, as detailed above.

Londono's salary is $500 per week, the same salary as admitted Supervisor DiBua. Pitter's salary was $600 per week, Arroyave's was $300, Saintvil made $236, Sigismondi made $325, and Justi made $206.[16]

Polanco was hired by Respondent in 1995. At that time, Richie Palagonia after speaking to Polanco, called Londono and asked Londono if he needed employees to work on the ovens. Londono replied yes, and Polanco was then hired to work on the oven.

In September 1999, Desgraves was hired by Respondent, and began working from 9 a.m. to 5 p.m. At that time, after speaking with Londono, he was hired by Richie Palagonia. Richie Palagonia told Desgraves that Londono was his supervisor, and instructed Londono to show Desgraves where he will be working. Three days later, Londono brought Desgraves to Richie Palagonia, and told Richie that he wanted Desgraves to work from 12 noon to 10 p.m. Desgraves protested saying that the time is not good for him because he is going to school. Richie replied that Desgraves would have to accept the change of hours. Thereafter, Desgraves continued to work from 12 noon to 10 p.m. for some period of time, until his shift was changed to 7 a.m. to 5 p.m.

When Desgraves worked the 12 noon to 10 p.m. shift, his lunch hour would start at either 2:30 or 3 p.m., and Londono would make the decision when Desgraves would start. On one occasion, Desgraves asked Londono if he could eat at 3 p.m. Londono replied, "[Y]ou have to wait. I'm the boss. I don't have enough people."

On another occasion, Desgraves got sick on Sunday and wanted to go home. He told Londono that he was sick and could not stay, and felt like he was going to vomit. Londono told Desgraves, "[I]f you go, don't return tomorrow." Desgraves then went to Richie Palagonia and told Richie that he was truly sick and could not stay. Richie replied that "I'm not the manager of the back. Whatever Sanchez said, you have to agree with him." Desgraves therefore stayed and worked until 6 p.m., and eventually spent 2 weeks in the hospital.

Desgraves, Peralta, Veras, and Polanco all testified that Londono was the production supervisor of about 15 employees in the bakery department. Londono is in charge of the shift that starts at 6 a.m. and ends at 2 p.m. In that capacity, Londono assigned work to the employees, and trains the new employees concerning their responsibilities towards Respondent. According to Desgraves, Londono has the same job as DiBua and Castiblanco (both admitted supervisors of Respondent), except that DiBua and Castiblanco perform these functions on different shifts.

If Londono needs a porter to work in the production department, he makes the decision, and asks the porter to come to perform production tasks. In such cases, Londono signs that employees timecard to make sure the employee gets paid. If the breads are cooked and must be taken to the freezer, Londono will call employees from the freezer department, and order them to bring the breads to the freezer. Initially, Peralta was assigned to take bread out of the oven. After another employee left, Londono changed Peralta's job assignment to taking bread out of a machine.

While Veras was employed by Respondent as a porter, he would once or twice a week be assigned by Londono, Castiblanco, or DiBua to perform work in the production department, such as mixing dough. Generally, Londono would ask Veras to work in the production department on Sundays, when the regular employee would be absent, which was usually once or twice a month. Veras was the only porter that Londono asked to mix dough, since it requires skills such as knowing the amounts of water that needs to be put in for a pound of flour. Veras also observed Londono changing job assignments of the 15–17 employees that he supervises, such as changing from one machine to another or changing them from the machine to pushing a cart. At times, when a worker in production would go to lunch, Londono would ask Veras or other porters to put boards in the oven or otherwise fill in for the employees going to lunch.

When overtime is needed, particularly when employees are absent, Londono would make the decision on his own, without checking with anyone, to assign employees overtime.

All the machines under Londono's supervision are not the same, some are more difficult to operate than others, and Londono decides which employees perform work on which machine based on his assessment of the employees' ability to operate that machine.

Polanco worked for Respondent for 7 months under Londono's supervision. When Polanco arrived at 6 a.m., the oven was not working so Londono would give Polanco other things to do until 9 a.m., when the oven began operating. If overtime

[16] Peralta and Desgraves who identified Londano as their supervisor received salaries of $355 and $286 respectively. Veras received a weekly wage of $236 while Polanco was paid $330.

was needed, Londono would authorize the overtime for Polanco. When Londono left for the day, DiBua replaced him as supervisor, and DiBua authorized overtime.

Desgraves testified that Arroyave and Saintvil are managers of the cleanup crew. Peralta stated that he has seen Arroyave serve as supervisor of the people who clean. Although Peralta is not a porter, he claims that he observed Arroyave supervise the porters. In that regard, Peralta observed Arroyave tell people what to do and give direction to them such as "clean this, clean that."

Veras testified that when he worked as a porter, Arroyave and Saintvil were his supervisors. Both Chris and Richie Palagonia told Veras that they were his supervisors. Veras came to work at 12 noon, and at about that time Arroyave was leaving. However, before he would leave, Arroyave would tell Veras what to do, and if there was an emergency, he would tell Veras "clean first this area, have it done soon."

According to Polanco, he was supervised as a porter by Steve Todo (an admitted supervisor of Respondent) and Saintvil. Todo at one point had an operation, and Respondent had a meeting of porters. At that time Chris told the porters that Saintvil would become the supervisor of porters. While Todo was out, Polanco asserts that Respondent promoted Arroyave also to be a supervisor of porters. Polanco claims that Arroyave "took care" of the Hatians and Saintvil supervised the Dominicans. In that regard, Arroyave and Saintvil directed the employees, told them what to do, and say "do that, do here, do there."

Prior to the election, Polanco also worked in the shipping and receiving department from time to time. On those occasions, Richie Palagonia would transfer him temporally from the oven to that department. According to Polanco, when Richie Palagonia was not present in the shipping and receiving department, in the mornings, Alex Justi was the supervisor. In that regard, Justi would direct Polanco to pick up the boxes and collect the boards. Justi also had a desk in the shipping and receiving area that he shared with Richie and Anthony Palagonia and Sigismondi.

Polanco also observed Sigismondi directing people in the shipping and receiving department. In that regard, Polanco was helping Sigismondi roll the bread boards with plastic, and Sigismondi would direct Polanco to take the plastic out. The record also reflects that in Case 29–RC–7825, Sigismondi, testified on behalf of Respondent during a hearing on Respondent's objections in November or December 1991. The hearing officers report characterized Sigismondi, as Respondent's "manager," with no further description of his duties and responsibilities at the time.

Patricia Palagonia is the wife of Anthony Palagonia, who is an admitted supervisor of Respondent and the brother of Joseph Palagonia. Anthony Palagonia has no ownership interest in Respondent and is not a corporate officer. Patricia Palagonia works in the office where she is under the supervision of Joseph Palagonia. She is not supervised by her husband Anthony, who in fact, works a different shift than her husband.

She performs filing and bookkeeping functions. When employees are hired by Respondent, Patricia obtains personal information from these employees, such as their social security number, passport, or resident alien card. She prepares a folder for each individual and turns it over to Gonzalez.

Gonzalez generally prepares the payroll checks for each employee, including its supervisors. After Gonzalez prepared the payroll checks, he would turn them over to Patricia Palagonia, who would "stamp" Christopher Palagonia's signature on each check. She also takes orders that come in over the phone and will either bring them out to the plant and give the orders to DiBua or another supervisor, or call the supervisor into the office and give him the order. Patricia also will document the order that comes in, sort out accounts payable files and place them back into the file cabinets.[17]

2. The objections

Respondent's sole witness with respect to its objections to the election was Joseph Palagonia. He testified on direct examination that on the day of the election, the last session began at 8 p.m. After the polls were opened, Palagonia heard an argument between Jose Merced, and DiBua Joseph asserts that he came over and asked Merced what he was doing and telling Merced, "[Y]ou don't belong here." Palagonia alleges that Merced answered, "I don't have to listen to anybody, fuck you." At that point, according to Palagonia, Merced left the building. After Merced left the building, Palagonia testified that Merced was screaming through the windows and yelling all kinds of stuff in English and Spanish through the windows. Palagonia adds that there were 10–15 employees in the polling area at the time, who could hear Merced yelling.

On cross-examination, Palagonia admitted that the front entrance to the premises was closed during the election, and insists that these doors were closed during the morning session as well, as per a discussion with the Board agent in Merced's presence. Palagonia also insisted that Merced did not tell him why he was in the premises on that day. He also testified that after Merced left, DiBua told Palagonia that he had ordered Merced not to come into the bakery and Merced had replied, "I don't have to listen to you." Palagonia also denied that he saw any other people with Merced at the time, and insists that until the Union filed its objections, he did not know what caused Merced to come into the bakery.

Merced then provided his testimony with respect to the incident. According to Merced, Respondent had kept the front entrance opened during the earlier polling periods, but for the evening period, Joseph Palagonia came out and announced to Merced that he was going to close the main entrance. Merced asserts that he protested that people would be unable to get into vote. Palagonia answered that they could enter the facility through the back, and that he would post a sign at the front, informing voters to enter through the back.

During this polling period, Merced testified that he picked up two employees, Yessina Chavez and Jose Medina.[18] Merced directed them to go in through the back as Palagonia had instructed. Three minutes later, the employees informed Merced

[17] My findings with respect to Patricia Palagonia's functions are based on a compilation of the credited portions of the testimony of Gonzalez and Joseph Palagonia, which is substantially in accord as to her responsibilities. Patricia Palagonia did not testify.

[18] They are husband and wife and Chavez was pregnant at the time.

that Londono was by the back door and wouldn't let the employees vote. Merced further testified that he then asked the employees to follow him. He walked through the parking lot to the back entrance. He was confronted by Londono who said, "[W]here the fuck are you going?" Merced replied that these people have a right to vote, they are on the *Excelsior* list and that Londono had denied them access. Londono answered, "[F]uck that. You're not coming in, I don't care what you say." Merced at that point, grabbed Chavez by the arm, opened the back door, and walked both employees into the building. He walked with the employees about 10 feet into the plant and directed the employees to go to the polling area, which was 75 to 100 feet away from where Merced was standing. The employees then went to the polling area and voted. Meanwhile, Londono followed Merced into the bakery and continued to curse at him. Londono said, "[M]other fucker, I told you that you can't come in here." Merced raised his voice and said, "[Y]ou're the motherfucker. Don't talk to me that way."

At that point, according to Merced, Joseph Palagonia came over. He asked Merced, "[W]hat are you doing here?" Merced replied that he wanted Medina and Chavez to vote, and added that they were on the list. By that time the employees had already voted. Palagonia then asked Merced to leave. Merced claims that he immediately left and denies that he cursed at Palagonia. Merced also denies that he yelled and screamed outside the plant, after he left. Further, Merced insists that employees in the polling area could not hear his argument with Londono.

Palagonia was then called back to the stand for rebuttal testimony. He testified that when he confronted Merced on the day of the election, Merced was in the packing area, which is 20 feet away from the polling area. He asserts that there were 12–15 employees in the area that heard Merced curse at him. Palagonia also insists that if an employee was in the polling area at the time, the employee would have heard the cursing. However, Palagonia admits that he did not know if any employees were in the voting area at the time. He did recall that Medina and Chavez had already voted, and were on their way out. In fact, Palagonia recalls congratulating Chavez and asking when the baby was due?

During this portion of his testimony, Palagonia recalled that Londono was present during the incident along with DiBua and that both of them were yelling and arguing with Merced.[19] Palagonia again denied that Merced told him why he was there or that he was bringing people into the premises to vote. However, on questioning by me, Palagonia admitted (contrary to his earlier testimony), that he was told by DiBua, that Merced sought to bring these two employees into vote. However, according to Palagonia, DiBua informed him that Merced insisted on coming in, but that DiBua had not denied entrance to the employees, but only to Merced, and that DiBua had permitted the employees to come into vote.

[19] Londano did not testify. DiBua although called as a witness by Respondent as to other issues, did not testify about this incident.

III. ANALYSIS AND CONCLUSIONS

A. The CA Cases

1. Alleged conduct in violation of Section 8(a)(1) of the Act

(a) Alleged threats

I have found that Chris Palagonia, at various times, told employees that if they voted for the Union, he would close the company and employees would be forced to go on strike. Such comments are clearly violative of the Act. I so find. *Dluback Co.*, 307 NLRB 1138, 1151–1152 (1992).

Additionally, Chris Palagonia told employee Peralta that if the Union wins the election, the "company is going to fail," and that "we're going to have problems." I conclude that these comments can reasonably be construed as an unlawful threat to close or to take other reprisals against the employees, if the employees support the Union, and are violative of Section 8(a)(1) of the Act.

While Peralta testified that he did not interpret Palagonia's statement as a threat to close, this is not determinative. Thus, it is well established that a "finding of restraint or coercion depends not on the subjective impressions of employees, but on the objective standard as to whether such conduct reasonably tends to interfere with the free exercise of employee rights." *Wis-Pack Foods, Inc.*, 319 NLRB 933, 937 (1995); *Helena Laboratories Corp.*, 228 NLRB 294, 295 (1977). Palagonia's remarks clearly met that standard, and are unlawful.

(b) Alleged promises of benefit

I have also found above that Respondent's officials made several blatantly unlawful promises of benefit to employees, in order to discourage them from supporting the Union. They include:

(1) Chris Palagonia's inquiry of Veras what he wanted to stop organizing the workers, cash or a salary raise, and Chris Palagonia asking Veras the next day whether Veras was going to accept the offer that Palagonia made the day before.

(2) Chris Palagonia promised Polanco a raise and a 2-week vacation, if Polanco told the Union that the employees didn't want them here anymore. Chris added that Respondent would give him more than the Union, and asked him to tell other employees that the Union will not help them.

(3) Chris Palagonia's statements to Desgraves in June that he would receive a 50-cent-an-hour raise if he voted for Respondent, and if he convinced other Haitian employees to do the same.

(4) Chris Palagonia's informing employees at a meeting in July, that they would receive a 50-cent raise if they voted for Respondent.

(5) In June, Chris Palagonia informed Peralta that if he voted against the Union, he would get "all the benefits that you get from the company," while adding that if the Union wins the company won't be able to give Peralta all the benefits he would get if the Union doesn't win.

Further, at a meeting of employees in July, Joseph Palagonia after criticizing the Union for taking money from employees and driving nice cars, told employees, "the door is open for you, if you vote for the Union, you close the door." The General Counsel concedes that such statements do not constitute unlawful threats to withdraw an existing benefit, since the comments merely reflects the effect that a 9(a) representative would have on Respondent's policy. *Ben Venue Laboratories, Inc*., 317 NLRB 900 (1995). However, the General Counsel contends that Palagonia's remarks constitute an unlawful promise of a new benefit to employees, in violation of Section 8(a)(1) of the Act. *Parts Depot,* 332 NLRB 670, 673 (2000). In that regard, the General Counsel argues that, since the record is barren of any evidence that Respondent had an "open door" policy prior to the organizing drive, or that such a policy had been advertised to employees, Palagonia's statement represents a promise of a new benefit, in violation of the Act. I disagree.

The General Counsel misperceives its burden of proof in these circumstances. It is the General Counsel's obligation to prove that the announcement by Palagonia represented a change of prior practice, and that his remarks therefore amounted to an unlawful promise of benefit. The fact that the open door policy may not have been advertised to employees does not mean it did not exist. Indeed, Joseph Palagonia credibly testified that his office is always open to speak to any employee who wishes to speak to him.

An examination of *Parts Depot,* supra, confirms my conclusions. Thus, the Board found a violation therein, because the employer had previously prevented employees from taking their concerns to the Employer's division president, Bassett, and were told to bring their concerns only to the warehouse manager. In such circumstances, the Board concluded that when Bassett during a meeting with employees, made reference to an ambiguous "open door" policy in the Employer's manual and told employees that they could see himself or the operations manager, this represented the articulation a new policy and improvement in working conditions in violation of the Act.

In the absence of any evidence that Respondent had ever prevented or discouraged employees from speaking to Joseph or indeed to any Palagonia, a similar finding cannot be made here.

I therefore recommend dismissal of this allegation of the complaint.

(c) The wage increase

During the week ending June 24, Respondent granted wage increases of from 25 to 50 cents per hour to six porters. These raises were granted, during the same week after the Union made its demand for recognition, on July 19. The timing of this raise by itself would be sufficient to raise an inference of unlawful motivation, which could be rebutted if Respondent could show that it decided upon such increase prior to the advent of the Union or that it was granted pursuant to Respondent's regular practices. *Skyline Distributors*, 319 NLRB 270, 275–276 (1995), *Capitol EMI Music,* 311 NLRB 997, 1012 (1993). Here, there is significantly more evidence than the timing of the raise that indicates its unlawful nature. Thus, after the raises were granted, Chris Palagonia criticized Gonzalez for giving some employees 50-cents-an-hour raises rather than 25 cents an hour as Chris Palagonia had instructed. Palagonia told Gonzalez that he didn't have the money to be giving out such raises, and added that his plan was to give raises of 25 cents now and 25 cents after the election. This comment clearly connects the raise to the outcome of the election.

Respondent argues however that the wage increase was motivated by its receipt of a Board of Education contract, and that it was merely fulfilling a promise that it had made to employees in September 1999. However, the record discloses that Respondent was not awarded the contract until August 14, over 7 weeks after the raise was granted. This evidence severely damages the validity of Respondent's defense.

Chris Palagonia attempted to explain this discrepancy be asserting that once it was informed by the Board that the previous bar on its right to bid was lifted, it believed that it would be granted the contract. However, Palagonia furnished no testimony and Respondent introduced no evidence to support this uncorroborated assertion, that Respondent had any reason to believe that merely because it had permission to bid on the contract, that it would in fact be the low bidder or otherwise be awarded the contract.

More importantly, even if I were to credit Palagonia's testimony that he believed in March or April that Respondent would win the contract, which I do not, such a finding would still not be sufficient to substantiate Respondent's defense. Thus, Respondent did not grant the raise in March or April, when Palagonia testified that Respondent believed that it would obtain the contract, but instead waited until the week of June 24, over 2 months after the date that it allegedly became confident of winning the bid. Respondent provided no credible explanation for waiting until the week of June 24, to grant the raises, and could point to no particular or significant event that motivated it to select that date for the raise. It goes without saying, that the date chosen was immediately after the Respondent was notified that the Union was seeking to organize its employees.

Palagonia did provide generalized and unconvincing testimony that it waited until late June to grant the raises for financial reasons, since it previously spent large sums to purchase machinery, and the machines were now working better. He furnished no explanation as to the alleged connection between the new machinery working better and Respondent's ability to give the raises. As to his implicit assertion that the purchase of the machinery had hampered Respondent's ability to give the raises, and that condition had changed by June, no records or other documents were produced to substantiate his vague and unconvincing testimony in this regard.

Finally, it also significant that Veras and Polanco, the two leading union adherents, were not granted raises, although they perform the same porters work as the employees who received the raises. Respondent provided no explanation for the failure to include Veras or Polanco in the group receiving raises. This constitutes additional support for my conclusion that the raises were motivated by the appearance of the Union, and Respondent's desire to dissuade its employees from supporting the Union.

Accordingly, based on the foregoing analysis and authorities, I conclude that Respondent has violated Section 8(a)(1) of the Act by granting wage increases to its employees.

(d) Alleged surveillance and giving employees the impression that their union activities were under surveillance

It is well settled that statements to employees that suggest that the employer is closely monitoring the employees union involvement, unlawfully creates the impression that his union activities are under surveillance in violation of Section 8(a)(1) of the Act. *Acme Bus Co.*, 320 NLRB 458, 477 (1995); *Lexsteel Industries*, 311 NLRB 257, 258 (1993); *Emerson Electric Co.*, 287 NLRB 1065 (1988).

Here, the record establishes several instances of Respondent's violating the Act in the fashion described in the above cases. Thus, three days after the Union demanded recognition, Chris Palagonia yelled at Veras, called him an "unhappy motherfucker" and accused him of trying to organize for the Union and getting the coworkers into the Union. Similarly, in late June, Chris Palagonia yelled at Polanco, called him a "motherfucker," and accused Polanco of being the one to bring in the Union. These remarks of Palagonia are clear violations of Section 8(a)(1) of the Act.

I have credited the testimony of Polanco that on June 23, the night of a scheduled union meeting at Polanco's house, he was driving several employees to the meeting in his car. The evidence establishes that Polanco and the other employees noticed that they were being followed by Joseph Palagonia. After being passed by Palagonia, Polanco noticed that Palagonia made a U-turn and hid behind another vehicle, and then continued to follow Polanco's car. These circumstances lead to the reasonable conclusion, which I make, that Palagonia became aware of the union meeting and was attempting to surveil the union activities of Respondent's employees.

Respondent attempts to explain this event by the testimony of Palagonia corroborated by employee Torres that Palagonia has, at times, driven Torres home, which is in the general vicinity of Elderts Lane, where part of the surveillance took place. However, I find this evidence unconvincing, since it was far from clear from their testimony that Palagonia taking Torres home occurred on the same day of the incident. More importantly, the credited evidence of Palagonia following Polanco, including making a U-turn and hiding behind another car, is inconsistent with the alleged activity of driving Torres home. Moreover, Polanco credibly testified that no one was in Palagonia's car on the day in question.

Accordingly, I conclude that by Palagonia's conduct, Respondent has engaged in surveillance of its employees' union activities, and has further violated Section 8(a)(1) of the Act. *Chopp & Co*., 295 NLRB 1058, 1066 (1989); *NLRB v. Nueva Engineering, Inc.*, 761 F.2d 961, 967 (4th Cir. 1985).

(e) The alleged interrogations

Immediately after receiving the Union's demand for recognition, Respondent summoned employee Ivan Diarrio into the office, where both Joseph and Chris Palagonia asked him if he knew anything about forming a Union? I find this questioning to be coercive and violative of the Act. The inquiry was made to Diarrio, who insofar as the record discloses was not an open and active union supporter, the questioning took place in Respondent's office, and was conducted by the two highest ranking officials of Respondent. These circumstances are sufficient to establish the coerciveness of the questioning, but coupled with the fact that it occurred in the context of and contemporaneous with Respondent's other unfair labor practices, as described above, there can be no doubt that the interrogation is violative of Section 8(a)(1) of the Act. *Parts Depot, Inc*., 332 NLRB at 672–673; *Seton Co*., 332 NLRB 979, 981–982 (2000); *EDP Medical Computer Systems*, 284 NLRB 1232, 1264–1265 (1987).

Similarly, Peralta was question by DiBua the day after a union meeting, and asked who had formed the committee of the Union? The next day, Chris Palagonia asked Peralta why he was against the Company since he was working for the Company? Palagonia accompanied these questions with unlawful promises of benefit as I have concluded above.

I find that both of these incidents are coercive and violative of the Act. Once again Peralta was not shown to be an open adherent of the Union. He was questioned by Palagonia, Respondent's highest official, which questioning was accompanied by unlawful promises of benefit. Such interrogation is clearly coercive. See cases cited above.

DiBua's questioning, particularly in the context of Respondent's other pervasive unfair labor practices as described above, and below, reasonably tends to color the employees perception of the character and reasons for the inquiry, and renders such questioning coercive and unlawful. *EDP*, supra; *Cardivan Co*., 271 NLRB 563 (1984).

The General Counsel also contends that Respondent violated the Act by failing to provide the appropriate *Johnnies Poultry*[20] safeguards before conducting an investigatory interview. Thus, in order to minimize the coercive impact of such an interview, while allowing the employer to investigate facts concerning issues in preparation for its defense, the Board requires the employer to

> communicate to the employee the purpose of the questioning, assure him that no reprisals will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employees hostility to union organization . . . . When an employer transgresses the boundaries of these safeguards he loses the benefits of the privilege. [Id. at 775.]

Here, in connection with preparing a response to the Region in response to the instant charges, Respondent's attorney interviewed several employees, and took affidavits from them that it eventually submitted in support of its position.

These affidavits were taken on September 11. Prior to speaking with Respondent's attorney, Chris Palagonia informed employees Cera and Dominguez that they had to testify, and he failed to give them any assurances against reprisals if they refused. After Palagonia brought the employees into the office to speak to the attorney, he left, and the attorney provided the employees with the appropriate *Johnnies Poultry* safeguards,

[20] 146 NLRB 370 (1964), enfd. denied on other grounds 344 F.2d 617 (8th Cir. 1965).

and had them sign a statement to that effect. The General Counsel argues that in these circumstances, Respondent has violated the requirements of *Johnnie's Poultry*. I agree.

Notwithstanding the fact that the attorney provided the employees with the appropriate assurances before questioning them, prior to that, Chris Palagonia had informed the employees that they had to testify, without any qualifications. In such circumstances, the employees could not have felt free to respond to the questions of Respondent's attorney, or to believe that their participation was voluntary. Moreover, the record reveals as I have found above that Respondent committed numerous unfair labor practice, such as threats to close, unlawful wage increases and promises of benefit, interrogation, surveillance and creating the impression of surveillance. Thus, these expressions by Respondent of hostility towards union activities of its employees, renders the questioning coercive. *Adair Standish Co*., 290 NLRB 317, 331 (1988).

Further, on the day that Respondent prepared Cera for the instant trial in March 2001, Respondent's attorney failed to give Cera any *Johnnie's Poultry* assurances, and merely discussed his pending testimony. Since the prior assurances that Respondent's attorney gave to Cera were not sufficiently close in time to the day of his testimony, Respondent cannot rely on these prior assurances to justify its failure to provide Cera with the requisite safeguards in March of 2001. *Le Bus*, 324 NLRB 588 (1997). Therefore, I conclude that by its conduct in preparing Cera for trial, without providing *Johnnie's Poultry* safeguards, Respondent has further violated Section 8(a)(1) of the Act.

2. The alleged violations of Section 8(a)(3) of the Act

(a) Alleged unlawful changes in working conditions

The complaint alleges and the General Counsel contends that Respondent unlawfully changed working conditions in several respects for employees Polanco and Desgraves, including closer supervision, imposing more onerous assignments, and changing their lunch hours in retaliation for their activities on behalf of the Union. These allegations, as with all alleged 8(a)(3) violations must be assessed under *Wright Line* standards, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981); *Portsmouth Ambulance Service*, 323 NLRB 311, 321 (1997).

Thus, the General Counsel must first establish that the working conditions of the employees, was changed and that the employees' union activities was a motivating factor, in the adverse changes.

The starting point for this analysis is the union activities of the employees involved. Here it is clear that both Polanco and Desgraves were active union adherents. Indeed, the record establishes that they were two of three leading union organizers, along with Veras. Polanco held union meetings at his home, wore union hats and shirts, and handed out leaflets and cards. Desgraves also handed out union leaflets to employees, attended union meetings, and acted as the union observer at the election.

Knowledge by Respondent of their union activities, is clear and not disputed. Indeed, Joseph Palagonia admitted that he was aware of Polanco's union activities. Both employees were seen by supervisors distributing union leaflets to employees. Degraves, in fact, gave one to Chris Palagonia, who responded by spitting on the documents.

Moreover, both employees were directly subjected to several statements that I have violative of Section 8(a)(1) of the Act. Thus, Polanco was directly accused of being responsible for organizing employees, thereby creating the impression of surveillance, was followed by Joseph Palagonia on the way to a union meeting, which amounted to unlawful surveillance, and was twice offered a raise and a additional vacation by Chris Palagonia, if he would abandon the Union and encourage other employees to do so. Desgraves was twice offered raises if he voted for the Respondent and if he convinced other Haitian employees to do the same. These blatant violations of the Act coupled with the other violations described above, particularly including the unlawful wage increase granted to employees, constitutes substantial evidence of animus towards the union activities of its employees.

Finally, these alleged unlawful changes all occurred shortly before or immediately after the July 28 election, which constitutes highly suspicious timing.

I now turn to the question of whether the General Counsel has proven that Respondent has made a change in working conditions of its employees as contended. With respect to Desgraves, one of the allegations is that after the election (where he served as an observer), Respondent directed him to work in a hot oven, and then immediately assigned him to go to the freezer, which Desgraves believed constituted "abuse." However, since he had not been assigned to work at the oven at all prior to the election, he had not been compelled to go to the freezer, immediately after working in the oven. Therefore, I cannot conclude that the General Counsel had established a change in his working conditions, by Desgraves being assigned to work on the oven immediately before working in the freezer.[21]

In such circumstances, I cannot find that the Respondent's assigning him to work in the freezer immediately after working in the oven is unlawful. Moreover, I am not persuaded that this assignment amounts to more onerous working conditions as the General Counsel asserts.

I therefore recommend dismissal of this allegation of the complaint.

However, I have credited Desgraves that Chris Palagonia yelled at him for punching in 10–15 minutes early and accused him of "stealing time." Palagonia had never yelled at him for this problem prior to the election. On one of these occasions, Palagonia accompanied this accusation by calling Desgraves a "slave" and or "fucking piece of shit." I find this conduct by Respondent to be in violation of the Act. It does represent a change from prior to the election, and since Desgraves acted as the union observer and was a leading union adherent, I find that this activity was a motivating factor in Respondent's actions. Respondent had given no explanation for Chris Palagonia's conduct, since Chris Palagonia furnished no testimony concerning this incident, or any explanation for his conduct.

[21] While Respondent did begin assigning him to work at the oven after the election, neither the complaint nor the General Counsel allege that this assignment violated the Act.

Therefore, I find that Respondent has not shown that it would have engaged in the same conduct, i.e., criticizing Desgraves for punching in early and cursing at him, absent his union activities. It has thereby violated Section 8(a)(1) and (3) of the Act.

Polanco credibly testified that after he started to organize for Respondent, he began to be followed by Richie Palagonia when he went upstairs to change or if he wanted to talk to another employee. Moreover, when he would also take a break for lunch or changed clothes, he would be followed and observed by either Richie, Chris, or Joseph Palagonia. I find Polanco's testimony believable and I credit same over the unconvincing denials of the Palagonia's.

I also conclude, that in view of the fact that Polanco was a leading union adherent, and was subject to numerous unfair labor practices as detailed above, that his union activities was a motivating factor in this increased supervision of his work. Since Respondent has offered no explanation for its decision to constantly follow him around the plant, including at lunch and breaktime, I find that it has failed to meet its *Wright Line* burden of proof. Accordingly, by its conduct in more closely supervising Polanco, Respondent has violated Section 8(a(1) and (3) of the Act.

I have also found above that Respondent changed the lunch hours of both Desgraves and Polanco. As for Desgraves, he normally ate lunch at 12 noon with other Haitian coworkers. On July 26, 2 days before the election, Desgraves handed out prounion leaflets to employees, and to Chris Palagonia, who in turn spit on the flyer.

The next day July 27, the day before the election, DiBua directed Desgraves to eat lunch at 11 a.m. and to eat with Saintvil, who Desgraves considered to be a supervisor and who had been campaigning against the Union. Thereafter, he was directed to eat lunch at his normal time. In these circumstances, the evidence is strong that Respondent's conduct was motivated by a desire to isolate Desgraves from his fellow employees on the day before the election, and was unlawful. Although DiBua was called as a witness, he was silent on the issue of changing Desgraves lunch hour on that day, and Respondent provided no other evidence or explanation for the change. Therefore, I find that Respondent has violated Section 8(a)(1) and (3) of the Act. *Overnite Transportation Co.*, 332 NLRB 1331 (2000); *Indiana Hospital*, 315 NLRB 647, 654 (1994).

Similarly, Polanco normally ate his lunch at 12:30 p.m. On one of the days that Respondent conducted its campaign meetings with employees (to which Polanco was not invited), Richie Palagonia changed Polanco's lunch hour to 12 noon. From that point on, until he went on vacation on August 7, Polanco's lunch hour continued to start at 12 noon. In view of the timing of this change, as well as the animus directed towards Polanco, the evidence is sufficient to conclude, which I do, that this change of lunch hour of Polanco was motivated by his union activities. Since Respondent as offered no explanation for this change of Polanco's lunch hour, it has failed to meet its *Wright Line* burden of establishing that it would have changed his lunch hour, absent his union activities. Accordingly, Respondent has once more violated Section 8(a)(1) and (3) of the Act.

(b) The discharges of Polanco and Veras

The complaint also alleges and the General Counsel contends that Respondent's terminations of Veras and Polanco are also violative of Section 8(a)(1) and (3) of the Act. Turning to Polanco, I find that the General Counsel has presented compelling evidence that a motivating factor in Respondent's decision to terminate him was Polanco's union activities.

In that regard, Polanco was one of the three leading union adherents and organizers amongst Respondent's employees. He distributed authorization cards to employees, gave out union leaflets to employees in the presence of supervisors on Respondent's premises, and held union meetings at his house. He was subject to several unfair labor practices, such as surveillance (being followed by Joseph Palagonia going to a union meeting), creation of the impression of surveillance, by being accused by Chris Palagonia of bringing in the Union, accompanied by Palagonia calling him a "motherfucker"; unlawful promises of benefits, when Chris Palagonia promised him a raise and 2-week vacation if he told the Union that the employees didn't want the Union anymore; as well as unlawful changes in his lunch hour and closer supervision, as I have found above.

Moreover, the timing of the discharge, on September 10, coming after the election and while objections and challenges are still pending, is further evidence of discriminatory motivation.

The above evidence, as noted above, is more than sufficient to establish a strong link between the discharge and protected conduct of Polanco. Thus, since the General Counsel has made a strong prima facie showing of discriminatory motivation, Respondent's burden of proof under *Wright Line*, supra, is substantial. *Vemco, Inc*., 304 NLRB 911, 912 (1991); *Eddyleon Chocolate Co.*, 301 NLRB 887, 889 (1991).

Respondent attempts to meet its *Wright Line* burden by arguing that it would have in effect terminated Polanco, by replacing him before he returned from vacation, absent his union activity. In this regard, it relies on the testimony of Joseph Palagonia that Respondent simply acted in accordance with its well-established policy, of not guaranteeing a job for any employee when they extend their vacation beyond 1 week. Thus, Joseph Palagonia testified that this policy on extended vacations has been made known to employees in the past and been consistently applied to other employees.

However, I found Palagonia's testimony, as to this issue to be unconvincing, unsupported by any records, and contradicted by credited testimony of Polanco as to Respondent's prior practice. Thus, Polanco in each of his past 6 years, was permitted to take vacations of 5–6 weeks, and never had a problem with returning to work. More importantly, he was never told, as Joseph Palagonia asserts, before he left on those occasions, that he would be allowed to return to work, only if work was available for him. Notably, Polanco was corroborated in this regard by former employee Quinonez Buenaventura, who credibly testified that in 1993, he went on a 4-week vacation, and was never informed that his return to work would be dependent on the availability of work. He returned to work after his vacation as Polanco did after his prior vacations, and was permitted to return to work.

This credited testimony severely damages Palagonia's assertion as to Respondent's prior practice. More importantly, however, is what happened in early June, when Polanco originally requested to take a 5-week vacation, starting June 28. Notably, at that time, prior to the Union's demand for recognition, Chris Palagonia granted Polanco permission to go on vacation (over the objection of Richie Palagonia) without saying anything about the possibility of his job not being available for him when he returns.

However, on June 27 (after the Union made its demand and filed its petition), Polanco changed his mind and decided not to go on vacation at that time. Respondent's reaction to that change of mind was quite significant. Richie Palagonia insisted that Polanco was on vacation and ordered him to punch out. Chris Palagonia began yelling at Polanco, called him a "motherfucker," and accused him of bringing in the Union. It is thus clear from the above evidence that Respondent was perfectly willing to allow Polanco to go on vacation starting June 28, and had given him unconditional permission in early June, before the Union's appearance became known. However, when Polanco declined to go on June 28, by that time Respondent was aware of his role as a union organizer. Therefore, Respondent was obviously disappointed at Polanco's decision not to leave on June 28, since it was aware that a petition had been filed and an election would be imminent. Indeed, Respondent had been through union election campaigns before, and knew that the absence of the key union organizer due to vacation, during the election campaign would be helpful to Respondent and be likely to hamper the Union's ability to win the election.[22]

Therefore, shortly after the July 28 election, when Polanco asked Joseph Palagonia for permission to go on vacation for 5 weeks and to return on September 8, Palagonia told him that he could go, but when he returns only if there is work, Respondent would employ him. This instruction was followed up by a letter, from Respondent's attorney, in response to a letter from the Union's attorney, reasserting this position, and asserting an alleged "longstanding practice" of Respondent. I conclude that it was the appearance of the Union, and Polanco's leadership role, that motivated Respondent to assert this alleged longstanding policy which was in effect a new policy, prior to Polanco leaving for his vacation. I believe that Respondent intended to replace him, as it eventually did, and had no intention of allowing him to return to work after his vacation ended.

While Palagonia testified that Respondent had, consistent with this alleged policy, terminated five other employees in 2000 for extending their vacation, this testimony is also unconvincing and most importantly not supported by any records. Palagonia testified that he looked at certain computer records of Respondent to compile the information, as to the names and dates of these alleged incidents, but these records were never introduced into the record by Respondent to support Palagonia's testimony. Additionally, and more significantly, Respondent never provided information subpoenaed by the General Counsel that would show vacations taken by *all* employees for a 3-year period. Thus, Respondent's evidence, i.e., Palagonia's unsupported testimony, is out of context, without an opportunity to determine, the duration of vacations, of others who were not terminated. Thus, an adverse inference is appropriate that these documents would show many others who took extended vacations without losing their jobs. *Teamsters Local 776 (Pennsy Supply)*, 313 NLRB 1148, 1152–1154 (1994). Indeed, Respondent's evidence that five employees were terminated for excessive vacations is an incomplete submission which makes a proper analysis of Respondent's past practice impossible, and lends credence to my finding that Respondent's evidence cannot be relied upon to meet its *Wright Line* burden.

Respondent argues that Palagonia's testimony is not necessarily inconsistent with the testimony of Polanco or Buenaventura that they were always permitted to return to work after extended vacations in the past, since there may simply have been work available for them in the past when they sought to return. I disagree. As I have related above, the important fact is that in the past, unlike in August 2000, these employees (Polanco and Buenaventura) were not told anything about an alleged policy of a return to work only if work was available. Further, Palagonia testified that Respondent generally tries to replace anyone who takes a vacation in excess of 1 week,[23] sometimes it cannot find anyone, sometimes they hire someone who doesn't work out, and sometimes someone else leaves. These various alleged occurrences, which allegedly according to Palagonia were responsible for work being available for Polanco and Buenaventura, in the past, when they returned from extended vacations, could easily have been established by Respondent's records. However, no such records were produced. Thus, Palagonia's unsupported testimony that in past years, they were allowed to return to work, after extended vacations, only because work was available for them, cannot be relied upon.

Most importantly, of all however, even if I were to accept Palagonia's unsupported testimony as to its past practice, Respondent still has not met its *Wright Line* burden of proof. Respondent claims that it replaced Polanco with Garcia on August 21, because it needed another porter, and it did not hire another porter thereafter. However, Respondent terminated Veras, also a porter, on August 25, 2 weeks before Polanco sought to return on September 10. Yet, Respondent did not permit Polanco to return to work, claiming there was no work for him. Respondent provided no explanation why it did not permit Polanco to replace Veras, or any other evidence as to why there was no work available for Polanco on September 10. I find this evidence highly significant and extremely damaging to Respondent's case. Indeed, porters work of cleaning up the facility is clearly the kind of work that is generally "available" in some respects, unlike for example work on a particular machine. Thus, the question of availability of porters work ap-

[22] The election was eventually held on July 28, a date that Polanco would have missed, if he had gone on his scheduled vacation, which was due to end on August 9.

[23] I note in this respect that Richie Palagonia testified contrary to Joseph Palagonia that Respondent gives employees 2 weeks vacation, and after that, a job is dependent upon availability. This contradiction between Respondent's witnesses on this point, further undermines Respondent's defense.

pears to be highly subjective, and Respondent provided no guidance to explain how it determined that Polanco needed to be replaced on August 21, and yet on September 10, after Veras had been fired, and not replaced, there was no need for Polanco. It is obvious to me particularly in the absence of any contrary explanation from Respondent, that Polanco's union activities is the only plausible explanation for Respondent's decision that there was no work for him on September 10.

Further support for this conclusion is found in the results of the election. Thus, despite Respondent's intensive campaign of coercive conduct, including unlawful threats, promises of benefits and an unlawful wage increase, as I have detailed above, the election although indeterminative, showed the Union ahead. In view of Respondent's unlawful campaign, it must have been disappointed by the results, which at least suggested that its unlawful campaign was not successful. I believe that Respondent was particularly disappointed with Polanco, since Chris Palagonia had promised him a raise and a 2-week vacation, if he convinced other employees not to vote for the Union. Initially, Polanco expressed skepticism about Palagonia's officer, since he had failed to deliver on a similar promise made to Polanco in 1997 during a prior union campaign. However, Palagonia explained that he didn't have money to give a raise at that time, and repeated his promise of a raise and 2 weeks paid vacation, if Polanco spoke to his coworkers and convinced them to abandon the Union. Palagonia asked Polanco if he was going to do so, Polanco said yes, and they shook hands. Therefore, it is reasonable to conclude, which I do, that Respondent was particularly upset with Polanco since it believed that it had "made a deal" with him to persuade others not to support the Union in exchange for a raise and benefits. Therefore, when the results of the election indicated that the Union was ahead, Respondent likely believed that Polanco had "doublecrossed" Respondent and had not carried out his part of the bargain, which I conclude provided substantial motivation for Respondent to retaliate against Polanco.

Finally, I also note that after Respondent's refusal to employ Polanco, it hired nine new employees, including packers, mechanics and bagel workers. During his 6 years of employment with Respondent, Polanco worked in production on the oven and worked with bagels and rolls. Respondent's witnesses provided no explanation for failing to offer or consider hiring Polanco for some of these positions, in view of his past experience. To the extent that Respondent might argue that, it was expecting Polanco to call, if he was interested in any future opening, I note that I have not credited Joseph Palagonia's testimony that he told Polanco to call Respondent to see if work became available. Instead, I have credited Polanco's testimony that Palagonia promised to call him about any future openings. Thus, the failure to offer Polanco any of these jobs, some of which he had experience with Respondent in performing, is further evidence damaging to Respondent's defense and to its attempt to meet its *Wright Line* burden. The Board has consistently held that the subsequent failure to offer employment to employees with experience to perform such available jobs, is further evidence of discrimination, and relates back to the initial decision to fail to employ Polanco. *Champion Rivet Co.*, 314 NLRB 1097, 1099 (1994), *Handy Andy, Inc.*, 296 NLRB 1001, 1003 (1989).

Accordingly, based on the foregoing analysis, I find that Respondent has fallen short of meeting its burden of proving that it would have refused to employ Polanco on September 10, thereby in effect terminating him, absent his activities and support of the Union. Therefore, by such conduct, Respondent has violated Section 8(a)(1) and (3) of the Act.

Turning to the discharge of Veras, once again a strong prima case of discriminatory motivation has been established. As with Polanco, Veras was one of the leading union adherents, Respondent was admittedly aware of same, and Veras was directly subjected to several serious unfair labor practices. Thus, Veras was yelled at and accused by Chris Palagonia of trying to organize for the Union, and called "an unhappy motherfucker." After admitting that he was one of the organizers for the Union, Palagonia replied that Veras was "not good for the company," which amounts to an implied threat of discharge or other reprisal. Over the next 2 days, Chris Palagonia tried a different tact with Veras, by twice offering him a raise in exchange for stopping his role in organizing. While Veras declined these offers, Palagonia told him to think about it. Further, Veras was in the car with Polanco, when Joseph Palagonia unlawfully followed them heading for the union meeting. Finally, Veras was told by Chris Palagonia that if he voted for the Union, Respondent would close the Company.

Moreover, Veras was terminated on August 24, less than month after the July 28 election, and at a time when objections and challenges were still pending. As I observed above with respect to Polanco, I believe that Respondent was quite disappointed that its unlawful campaign had not been successful, and that the Union was ahead in the election, pending determination of challenges. I conclude also that Respondent was particularly upset with Veras (as well as Polanco) for their role in organizing the Union, particularly since Respondent had promised Veras a raise to cease his union activities.

Finally, and perhaps most importantly, during the course of his confrontation with Palagonia, Veras raised the issue of the Union by stating that the "Union's coming soon, I've got the Union." These comments obviously in response to Veras' belief that representation by the Union will prevent Palagonia from mistreating employees amounts to union activity, and clearly establishes a link between such union activities and his discharge. Thus, once again the evidence is compelling that Veras protected conduct was a motivating factor in Respondent's decision to terminate him. *Wright Line*, supra. As with Polanco, where the prima facie showing is so strong, Respondent's burden of proof that it would have taken the same action absent such protected conduct, is substantial. *Vemco*, supra; *Eddyleon Chocolate*, supra.

In that regard, Respondent argues that it has met that burden by establishing that Veras engaged in a "vile, grossly insubordinate manner towards Christopher Palagonia in the presence of numerous employees and management witnesses." I have found above that in the course of a confrontation with Chris Palagonia, Veras did curse at Palagonia, calling him a "motherfucker" and adding "fuck you, fuck the bakery." He also pointed his middle finger at Palagonia, although Palagonia's

back was turned at the time. Respondent argues that this conduct of Veras more than justifies Veras' discharge, relying on Joseph Palagonia's testimony, that "if you can get away with calling the President of the Company a 'motherfucker,' and giving him the finger, how can any supervisor run the bakery after that, it would be totally impossible." Respondent's position has some surface appeal, since the Board has frequently found that such conduct, particularly where, as here, it occurs in the presence of other employees, warrants discharge and loss of the Act's protection. *Piper Realty Co*., 313 NLRB 1289, 1290 (1994); *Transit Management of Southeast Louisiana,* 331 NLRB 248, 249–250 (2000); see also *Atlantic Steel Co*., 245 NLRB 814, 816 (1979).

However, the Board has also long held, supported by the courts, that an employer cannot provoke an employee to the point where the employee commits acts of misconduct, including insubordination, profanity, threats or even at times physical assaults, and then rely on such acts to discipline the employee. *Caterpillar, Inc*., 322 NLRB 674, 678–679 (1996); *Indian Hills Care Center,* 321 NLRB 144, 151–155 (1996); *Romar Refuse Removal,* 314 NLRB 658, 671 (1994); *Teskid Aluminium Foundry*, 311 NLRB 711, 720 (1993); *Action Auto Stores*, 298 NLRB 875, 900 (1990); *299 Lincoln Street, Inc.*, 292 NLRB 172, 203 (1988), *Tubari Ltd*., 287 NLRB 1273, 1285 (1988), *E. I. du Pont & Co.*, 263 NLRB 159, 160 (1982), enfd. on other grounds 750 F.2d 524 (6th Cir. 1984); *NLRB v. Vought Co*., 788 F.2d 1378, 1383–1384 (8th Cir. 1986); *NLRB v. Southwestern Bell Telephone,* 694 F.2d 974, 978–979 (5th Cir. 1982); *NLRB v. Steinerfilm*, 669 F.2d 845 (1st Cir. 1982); *NLRB v. M & B Headwear, Inc.*, 349 F.2d 170, 174 (4th Cir. 1965).

In assessing the issue of provocation, it is appropriate to compare the seriousness of Respondent's conduct with the extent of Veras' reaction, *Caterpillar*, supra at 678. Here, as in *Caterpillar* and other cases cited, Veras was subject to a pattern of "unjust and discriminatory treatment." Thus, on or about June 22, shortly after the Union requested recognition, Chris Palagonia yelled at Veras that he was trying to organize for the Union and called Veras "an unhappy motherfucker." Chris added that Veras was "not good for the Company," an implied threat of discharge.[24] Palagonia continued to harass Veras by constantly yelling at him (contrary to his conduct prior to Veras' protected union activities), and then tried a different tact by promising him benefits if he withdrew his support from the Union. Further, Veras was in the car with Polanco, going to a union meeting, when they were followed by Joseph Palagonia constituting surveillance in violation of Section 8(a)(1) of the Act.

Finally, on August 24, Chris Palagonia approached Veras while he was conversing with employee Cera, and asked Veras, but not Cera why he was talking and not working? When Veras did not reply, Palagonia called Veras a "motherfucker Dominican," and again accused Veras of not working. It is significant to note that although Veras and Cera were both talking, Palagonia said nothing to Cera about either talking or not working. While Respondent attempted to explain this disparity by pointing out that Cera's machine was in operation, this explanation is unconvincing. Indeed, Chris Palagonia testified that it was dangerous for Veras to be talking with Cera since Cera would not be able to concentrate on his machine. Clearly, it would be just as dangerous for Cera to be talking with Veras, since it would be just as likely to affect his concentration. Yet, Palagonia did not instruct Cera to either stop talking or to go back to work. This blatantly discriminatory harassment of Veras continued, when Palagonia then took the garbage can which Veras was on his way to empty, and threw it and a sweeper about 10 feet away. He then told Veras that he was going to the office to look for a camera to take a picture. This conduct could only be construed as an attempt by Palagonia to photograph the mess that he had created and charge Veras with misconduct and possible discipline or discharge.[25] When Veras foiled that scheme by picking up the sweeper and the garbage and emptying it in the yard, Palagonia continued his harassment of Veras in the yard. He again called Veras a "motherfucker Dominican," and then repeated that profanity once more as they were walking back from the yard. When Palagonia asked why he was calling Veras such names, Palagonia responded yes and put his hand on Veras' chest.

Finally, by the time Palagonia walked back into the plant, Palagonia ordered Veras to go back to work, or "I will send you home." At that point, Veras "lost it" and began to curse at Palagonia, adding that "the Union is coming . . . . I've got the Union."

I conclude that the statement of Palagonia in these circumstances, and against this history of harassment, can reasonably be construed as an unlawful threat of discharge, which if alleged I would have so found. Since there is no such allegation, I can, however, consider this as further unlawful harassment and provocation for Veras' response. *Felix Industries*, supra.[26] See also *Action Auto Stores*, supra (supervisor's statement to an employee get to work or "get the f— out," held to be uncalled for ultimatum reasonably calculated to generate an angry response, which it did).

Thus, based on the above described facts, particularly Palagonia singling Veras out for talking to a coworker, having had garbage thrown by Palagonia in an attempt to charge Veras with misconduct, Palagonia calling Veras a "Dominican motherfucker" three times, Palagonia jabbing his finger in Veras' chest, and finally threatening to discharge him, leads me to conclude that this "relentless harassment" drove Veras to the point of no return; and when Veras reacted by cursing at Palagonia and giving him the finger, Respondents seized on

[24] Since this statement is not alleged as a violation of the Act, I make no such finding, but I can and do conclude that I would have so found had it been alleged, and I can rely on the statement in assessing the issue of provocation. *Felix Industries*, 331 NLRB 48, 49 (2000), enfd. denied on other grounds 251 F.3d 1051 (D.C. Cir. 2001).

[25] In this respect, it is clear that Palagonia's conduct must be evaluated from Veras' perspective. *Felix Industries*, supra, 251 F.3d at 1056. Thus, there can be no doubt that Veras reasonably believed that he was being singled out and Palagonia was attempting to set him up for possible discharge.

[26] I note that the court of appeals although denying enforcement, and remanding the case for further explication by the Board, specifically affirmed the Board's findings on the issue of provocation.

that as a justification for his discharge. "The statute does not permit Respondent to so act." *E. I. du Pont,* supra at 159. Veras' conduct was clearly provoked by Respondent, and Respondent cannot rely on this misconduct to support its discharge decision. *Caterpillar*, supra; *Teskid Aluminum*, supra at 220 (Employee called supervisor a "stupid motherfucker." Held supervisor provoked and baited employee into inviting the result obtained.); *299 Lincoln Street,* supra; *Tubari Ltd*., supra; *E. I. du Pont,* supra.

Indeed, much more serious misconduct than that engaged in by Veras, including threats and physical assaults have been found to have been provoked by prior conduct of employers, and thereby preclude the employers from relying on such misconduct to justify discharge. *Caterpillar,* supra (employee called supervisor a "motherfucking liar," threatened to deal with supervisor on the outside, and with his finger struck supervisor on the top part of his body); *Tubari,* supra (employee threw his gloves on the floor and angrily headed towards company president only to be stopped by another employee, and began screaming at president); *Romar Refuse,* supra (employee punched supervisor, threatened to "stomp his goddam ass in the floor," and asked supervisor if he wanted to fight); *Blue Jeans Co*., 170 NLRB 1425, 1426 (1968) (employee "threatened to kill the S.O.B.," who informed on her, and threatened plant manager with scissors); *NLRB v. Vought,* supra, enfd. 273 NLRB 1290, 1291 (1984) (employee told supervisor, "I'll have your ass"); *NLRB v. Steinefilm,* supra (employee offered to "settle" things with supervisor "out in the cornfield," slapped his fist into his palm, plus using abusive and offensive language).

Further, in addition to concluding which I do, that Respondent's provocation of Veras, precludes it from relying on Veras' profanity and alleged insubordination to justify the discharge, I also rely on other evidence to find that Respondent had failed to meet its *Wright Line* burden of proof.

Thus, the evidence reveals that profanity is common at Respondent's facility, and that indeed, Chris Palagonia, used it frequently towards employees, including Veras. Such evidence demonstrates that Respondent has not shown that it would have discharged Veras absent his union activity. *Sunbelt Mfg.*, 308 NLRB 780, 786–788 (1992); *Action Auto Sales,* supra at 900, *Vought,* supra, 273 NLRB at 1295; *Burle Industries*, 300 NLRB 498, 505 (1970). Here, the fact that Chris Palagonia himself had previously not only called Veras a "motherfucker," but made a similar comment to Polanco another union adherent, and called a third union advocate, Desgraves, a "slave" and a "fucking piece of shit," makes Respondent's alleged reliance on profanity directed towards Chris Palagonia as a justification for discharge, highly suspect. *Greystone Bakery*, 327 NLRB 433, 445 (1999) (supervisor used same profanity as employee).

Finally, I note that Respondent failed to afford Veras an opportunity to respond or give his side of the allegations against him. In this regard, although Chris Palagonia is the president of Respondent with full authority to discharge, he generally leaves or at least consults with Joseph Palagonia, who is in charge of personnel matters as general manager. Thus, Joseph Palagonia testified that after hearing from Chris about Veras' conduct, he investigated by speaking to Supervisor Castiblanco and one employee, who allegedly confirmed Chris's version of events. However, Joseph admits not calling in Veras to get side of the incident, before deciding to discharge him. When asked might it have made a difference in his decision had he been told about Veras' version of the incident, Joseph testified no, since he did not believe that Chris would curse at employees. However, I find this testimony unconvincing and strained. Had Veras given his version of the incident, including the provocation that I have found above, it certainly would have been likely to at least require further investigation, if not at least asking Chris if any of what Veras testified to was true.

Thus, Respondent's failure to afford Veras an opportunity to respond to the allegations against him, demonstrates that Respondent was not truly interested in determining whether misconduct had actually occurred, and lends support to an inference of unlawful motivation *Government Employees (IBP0),* 327 NLRB 676, 701 (1999); *Washington Nursing Home*; 321 NLRB 366, 375 (1996); *Paper Mart*, 319 NLRB 9, 10 (1995).

Accordingly, based on the foregoing analysis and authorities, I conclude that Respondent has not shown that it would have terminated Veras, absent his protected conduct, and that it has therefore violated Section 8(a)(1) and (3) of the Act.

Veras' discharge can also be evaluated under a somewhat different rationale, although the ultimate result is the same. Thus, where an employee is engaged in concerted activity, the employee's right to engage in such activity "may permit some leeway for impulsive behavior that must be balanced against the employer's right to maintain order and respect." *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965). In that regard, the use of strong language in the course of protected activities supplies no legal justification for disciplining an employee except in those circumstances where the conduct is so flagrant or egregious, that it renders the individual unfit for future service. *Indian Hills Care Center,* 321 NLRB 144, 151–152 (1946); *Hawthorne Mazda, Inc*., 251 NLRB 313, 316 (1980); *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 329 (7th Cir. 1976); *Caterpillar*, supra at 677.

In making the assessment as to whether an employee's conduct crosses the line and is transformed into unprotected activity, the inquiry focuses on whether the employee's language is "indefensible," in the context of the concerted activity involved. *Caterpillar,* supra, *NLRB v. Vought,* supra, 788 F.2d at 1384; *NLRB v. Max Factor & Co.*, 640 F.2d 197, 204 (9th Cir. 1980*); NLRB v. Florida Medical Center*, 576 F.2d 666, 672 (5th Cir. 1978).

In applying these principles to the instant case, it must first be determined whether or not Veras was engaged in protected conduct, during his confrontation with Palagonia. While ordinarily the cases applying this analysis deal with situations where an employee is attempting to enforce a contract claim under a collective-bargaining agreement, *Felix Industries,* supra, or engaging in a grievance discussion *Caterpillar,* supra, or otherwise engaging in concerted activity under the standards of *Meyers Industries*, 268 NLRB 493 (1984); *Indian Hills,* supra, the analysis is also appropriate where the employee is engaged in union activity. *Fairfax Hospital*, 310 NLRB 299, 300 (1993); *Brunswick Food & Drug*, 284 NLRB 663 (1987), enfd. mem. 859 F.2d 927 (11th Cir. 1988).

Here, it is clear that during the course of his confrontation with Palagonia, Veras stated that "the Union is coming soon, ... We've got the Union." These comments amounted to Veras' invoking his belief that the Union was going to become the representative of Respondent's employees, and that this would protect Veras from future harassment by Respondent. Such conduct is therefore considered "union activity" and makes the above analysis appropriate. *Fairfax,* supra.

Interestingly, generally the Board views the burden on employer's to be somewhat higher in such cases, and in fact, has held that a *Wright Line* analysis is not proper. *Felix Industries,* supra. Thus, while the employer might in some circumstances meet its *Wright Line* burden by proving it would have terminated the employee, absent his protected conduct, that cannot justify the discharge, unless it meets the standards set forth above, i.e., egregious or indefensible conduct of the employee, rendering him unfit for future service. On the other hand, the Board has also observed that even if the employee's conduct is held to have lost its protection by virtue of employee misconduct, the employer's decision is still subject to a *Wright Line* analysis, which then decides whether other prior union or protected conduct of the employee, motivated the termination. *Caterpillar,* supra, *Fairfax,* supra.

The Board in *Fairfax,* supra, and *Caterpillar,* supra, analyzed the cases under both rationales and concluded that under either theory the employer violated the Act. I make the same finding here.

Thus, in assessing whether an employee's conduct is "indefensible" in the context of the protected conduct, it is highly significant whether or not the employee's conduct was provoked by the Employer. *Caterpillar,* supra at 677; *Indian Hills,* supra at 152; *Felix Industries,* supra at 49; *Brunswick Food,* supra at 664–665;*Vought,* supra, 788 F.2d at 1384, *Steiner Film,* supra, 669 F.2d at 852; *Florida Medical,* supra, 536 F.2d at 673.

As I have described in detail above during my *Wright Line* analysis, I conclude that Respondent provoked Veras prior to and during his confrontation with Chris Palagonia, including Palagonia calling Veras a "motherfucking Dominican," three times on that day (and once on a prior incident), and Palagonia putting his finger on Veras' chest, all prior to Veras engaging in any profanity or misconduct. Further, I have also found that Palagonia attempted to set Veras up for discharge, by throwing the garbage can plus a sweeper 10 feet away, and threatening to get a camera. In these circumstances, I find that Veras' conduct was a spontaneous and impulsive outburst that was triggered by Palagonia's own inflammatory conduct. *Caterpillar,* supra at 677. There is no evidence that during his years with Respondent, Veras was a violent or dangerous person or had engaged in similar conduct before. Thus, here as in *Caterpillar,* supra, Veras simply "lost it," after Palagonia's provocative conduct, and made the spontaneous and emotional outburst at issue. Therefore, I conclude that Veras' conduct during the confrontation was not of such a flagrant or serious character, as to be "indefensible" in the "context of the grievance involved," thereby depriving him of the protections of the Act and rendering him unfit for further service. *Caterpillar,* supra at 677 (employee called supervisor a motherfucking liar and threatened to deal with him outside, found not to be "indefensible," since it was provoked by supervisors calling employee names and making unlawful statements to employee); *Brunswick,* supra; *NLRB v. Southwestern Bell,* 694 F.2d 974 978–979 (5th Cir. 1982). I note that Respondent emphasizes the fact that Veras' conduct took place on the shop floor, in the presence of other employees. While that has been considered in an important element in determining whether conduct losses its protection, *Piper Realty,* supra, *Atlantic Steel,* 245 NLRB 814, 816–817 (1979), this is only one element in the Board's analysis, and is generally outweighed where as here, there is provocation by the employer. *Felix Industries,* supra; *Southwestern Bell,* supra; *Brunswick,* supra. It is significant in this respect, that it was Palagonia who started the confrontation on the shop floor in the presence of other employees. Thus, having started the dispute in front of other workers, Respondent can hardly complain about the public nature of the discussion. *Southwestern Bell,* supra, 694 F.2d at 978; *Brunswick Food,* supra at 665 (employer selected the setting for the confrontation, and is thus hardly in a position to object that customers were drawn into it).

Accordingly, I conclude that Veras' conduct during the confrontation with Palagonia was provoked, and did not lose the protection of the Act. Therefore, Respondent's discharge of Veras for his conduct during their confrontation was violative of Section 8(a)(1) and (3) of the Act, apart from *Wright Line* considerations.[27]

B. The Representation Case

1. The challenges

The Board in *Azusa Ranch Market,* 321 NLRB 811, 812 (1996), summarized the key elements in determining supervisory status.

> Section 2(11) of the Act defines the term "supervisor" as "any individual having authority, in the interest of the employer, to hire transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Only individuals with "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen . . . and other minor supervisory employees." *Chicago Metallic Corp*., 273 NLRB 1677, 1688 (1985), enfd. in relevant part 794 F.2d 527 (9th Cir. 1986). Thus, an individual who exercises some "supervisory authority" only in a routine clerical, or perfunctory manner will not be found to be a supervisor. *Bowne of Houston*, 280 NLRB 1222, 1223 (1986). "The Board must judge whether the record proves that an alleged supervisor's role was other than routine communications of instructions between management and employees without the exercise of any significant discretion." Further, the burden of proving that an individual is a supervisor is on the party alleging such status. *California Beverage Co*., 283

[27] As related above, I have previously found that using a *Wright Line* analysis, Respondent has also violated the Act by discharging Veras.

> NLRB 328 (1987). The Board has a duty not to construe the statutory language too broadly because the individual found to be a supervisor is denied the employee rights that are protected under the Act. *Hydro Conduit Corp*., 254 NLRB 433, 437 (1981)."

However, it is also clear that the possession of any one of the indicia of supervisory status listed in Section 2(11) of the Act is sufficient to confer supervisory status on an employee. *Sunnyside Farms*, 308 NLRB 346, 347 (1992); *Butler Johnson Corp. v. NLRB*, 608 F.2d 1303, 1306 fn. 4 (9th Cir. 1979).

In applying those principles to the challenges before me, I conclude that the Union has presented sufficient evidence that Uriel Londono (also known as Sanchez) exercised independent judgement in connection with several of the indicia under Section 2(11) of the Act, and is therefore a supervisor under that section.

Thus, I have found above that Londono assigned overtime to employees without checking with any other members of management. *Cannon Industries*, 291 NLRB 632 (1988). He also brought Desgraves to Richie Palagonia and said that he wanted Desgraves' hours changed. Although Desgraves protested stating that the new time was not good for him, Richie Palagonia went along with Londono's recommendation, and Desgraves' hours were changed. Although the ultimate decision was made by Palagonia, the above evidence demonstrates that Londono effectively recommended the change in Desgraves' hours, based on his independent judgment of Respondent's production needs, which is an indicia of supervisory authority. *Entergy Systems & Services*, 328 NLRB 902 (1999); *Venture Industries*, 327 NLRB 918, 919 (1999).

Moreover, the evidence reveals that Londono assigned work to 15 employees in the bakery department, which assignments involved the exercise of independent judgment, since there are differences in ability amongst employees, as well as differences in degree of difficulty of operating Respondent's machines. It is Londono who makes the decision based on his assessment of the employee's ability to operate the machine. *DST Industries*, 310 NLRB 957, 958 (1993); *Supervisor Bakery*, 294 NLRB 256, 262 (1989); *Rose Metal Products*, 289 NLRB 1153 (1988)*; IIlini Steel Fabricators*, 197 NLRB 303 (1972).

Also, Londono regularly exercised the authority to reassign employees working in other departments such as porters to work in the production department, as well to reassign employees within the department to different tasks. Once again, Londono exercised independent judgment in regard to these responsibilities, particularly where for example he would assign Veras to work in the production department mixing dough. This assignment required Londono to make an assessment that Veras was capable of mixing dough, a task that other porters were not capable of performing. Such reassignment of employees is also sufficient to establish supervisory status of Londono. *Sunnyside Home Care*, supra; *Polynesian Hospitality Tours*, 297 NLRB 228, 238–240 (1984); *Liquid Transporters*, 257 NLRB 345 (1982).

Additionally, when Desgraves was hired, Richie Palagonia asked Londono if he needed employees to work in the oven. When Londono said yes, Desgraves was hired. This evidence indicates that Londono's role in the hiring process is supportive of his supervisory status. *Holly Farms Co.*, 311 NLRB 273, 293 (1993).

Additional factors in the record which further support my finding that Londono was supervisor, include the facts that employees consider him to be a supervisor, *K.B.I. Security*, 318 NLRB 268 (1995); *Baby Watson Cheesecake*, 320 NLRB 779, 784 (1996),[28] his salary is considerably higher than unit employees and is in fact the same as that of admitted Supervisor DiBua, *McLatchy Newspapers*, 307 NLRB 773 (1992), *Illini Steel*, supra; he told employees when to take their lunch hours, *Illini Steel*, supra, and he used a separate room (under lock and key) that was not available to unit employees, to meet and relax during his shift. Based on the above, I conclude that Londono is a supervisor under Section 2(11) of the Act, and that the challenge to his ballot should be sustained.

The Union argues that the evidence establishes that the remaining challenged individuals, Saintvil, Arroyave, Pitter, Sigismondi, and Justi exercised independent judgment in assignment of work, transfer of employees, and direction of employees to stay beyond their shifts. That plus various secondary indicia such as higher pay, use of separate room and attendance at management meetings, according to the Union leads to the conclusion that these individuals are also supervisors under Section 2(11) of the Act. I do not agree.

The Union relies primarily on the credited testimony of Gonzalez, which established that these individuals would initial time cards of employees, which was necessary in order for Gonzalez on behalf of Respondent to pay employees for overtime or for work where the timecards malfunctioned. According to the Union, this evidence supports the conclusion that these individuals authorize overtime or other pay beyond their normal weekly wage. However, in my judgment this evidence proves only that these individuals were merely certifying that the employees either worked the overtime or that the overtime was authorized by Respondent. It proves nothing about who actually authorized or assigned the overtime, or what role, if any, was played by these individuals in that regard. Thus, there is no evidence that any of these five individuals ever assigned or authorized in advance overtime for employees, or even if these individuals requested the employees to work the overtime. It is noted that asking employees to perform overtime does not entail the exercise of independent judgment. *Ryder Truck Rental*, 326 NLRB 1386, 1387 (l998).

In contrast to Londono, where as I have found above, he assigned the overtime to employees without checking with any one from management, these individuals by initialing the time cards merely engaged in a reportorial, clerical functions, which is insufficient to confirm supervisory status on them. *Fleming Cos*., 330 NLRB 277, 281 (1999); *Byers Engineering Co*., 324 NLRB 740 (1997).

[28] I note in this regard that Desgraves was specifically told by Richie Palagonia that Londono was his supervisor, and that when Desgraves complained to Richie about Londono not allowing him to go home because of illness, Richie told Desgraves, "I'm not the manager of the back, whatever Sanchez says, you have to agree with him."

In terms of assigning work, the evidence indicates that Arroyave and Saintvil directed the work of the porters by telling them what to do, such as "clean this, clean that," or clean first this area, have it done soon, or "do that, do here, do there." Such assignments and directions do not establish the requisite independent judgment on the part of either Saintvil or Arroyave. There is no evidence that any of the jobs assigned to the porters requires any particular skills, nor that the abilities of any of the employees who perform the jobs differed substantially, such that selecting a particular employee for a task would require independent judgment. *Bozeman Deaconess Foundation*, 322 NLRB 1107 (1997). Therefore, the assignment and direction of work exercised by Saintvil and Arroyove is routine, and not supportive of supervisory status. *Bozeman*, supra; *Fleming*, supra.

Similarly, the record discloses that Justi and Sigismondi would direct people in the shipping and receiving department, when Richie Palagonia was not present. These directions would include taking out the plastic or picking up boards. Once more there is no evidence of any difference in skills amongst employees in that department, or that the different jobs require particular skills or abilities. Thus, there is no evidence that Justi or Sigismondi exercises independent judgment in their assignment of work. *Bozeman*, supra, *Fleming*, supra.

There is also evidence in the record that Arroyave had at various times informed Gonzalez that he had recommended to Chris Palagonia that certain employees receive raises. However, as Gonzalez conceded raises were not given to employees until June, as detailed above. Thus, there is no evidence that Arroyave made an effective recommendation of wage increases for Respondent's employees.

The record did reveal that immediately after the Union's demand in June, Arroyave asked Gonzalez for a spreadsheet of all porters, including their names and rates of pay. After receiving the list from Gonzalez, Chris Palagonia said to Arroyave, "[Y]ou have to give them the raise, but first tell them this." Although employees received raises shortly thereafter, this evidence falls far short of establishing that Arroyave made an effective recommendation for raises. On the contrary, the above suggests that although Arroyave may have previously recommended raises for employees, the raises were not given until the Union appeared. Therefore, Respondent granted the raises not due to any recommendation of Arroyave, but because the Union demanded recognition. The fact that Chris Palagonia instructed Arroyave to tell employees something about the raise, merely establishes that Arroyave acted as a conduit for management, which is not sufficient to prove supervisory status. *Fleming*, supra*; Chicago Metallic*, 273 NLRB 1677, 1693 (1985).

Further, Gonzalez was told by various of these individuals that they were either a supervisor or a foreman, and by Joseph Palagonia that in effect these individuals (who initial time cards) were direct supervisors of the employees in their departments, Veras was told by Chris and Richie Palagonia that Saintvil and Arroyave were his supervisors, and Chris Palagonia told porters that Saintvil would become the supervisor of the porters, while Todo (an admitted supervisor) was out of work. However, this evidence provides no indication of what functions or responsibilities these individuals performed as supervisors or foreman. These terms are conclusionary and do not establish supervisory status, since it is well settled that the use of a title does not make an employee a supervisor. *Fleming*, supra at fn. 1; *North Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976).

Similarly, the evidence that in a 1991 hearing officer's report, Sigismondi was referred to as a "manager," is inconsequential. Thus, the record does not reflect how the hearing officer concluded that Sigismondi was a "manager" in 1981 or even that the issue was litigated in that proceeding. Moreover, as noted the conclusionary title of manager or supervisor does not make an employee a supervisor.

The above evidence, i.e., the fact that these individuals were referred to by management as "supervisor," is at best secondary indicia of supervisory status, which along with other evidence relied on by the Union, such as pay differential, attendance at supervisors meetings, and use of an office under lock and key, cannot be considered in the absence of evidence that these individuals possessed any of the enumerated categories of authority in Section 2(11) of the Act. *Hausner Hard-Chrome of Ky, Inc.*, 326 NLRB 426, 427 (1998); *J. C. Brock Corp.*, 314 NLRB 157, 159 (1994).

Accordingly, I conclude that the Union has not met its burden of proof that Saintvil, Arroyave, Justi, Sigismondi, or Pitter are supervisors under Section 2(11) of the Act, and that the challenges to their ballots should be overruled.

That leaves the final challenge for determination, the ballot of Patricia Palagonia. The Union contends that the challenge to her vote should be sustained, because she is not a unit employee, is a confidential employee, and is a relative of management.

The unit agreed to by the parties in the Stipulated Election Agreement includes plant clericals, and excludes office clerical and sales employees. The distinction drawn by the Board between office clericals and plant clericals, is not always clear. *Hamilton Halter Co.*, 270 NLRB 331, 332 (1984); *Gordonsville Industries*, 252 NLRB 563, 590 (1980). The distinction is posted in community-of-interest concepts. Clericals whose principal functions and duties relate to the general office operations and are performed within the office itself are office clericals who do not have a close community of interest with a production unit. *Mitchellace Co*., 314 NLRB 536, 537 (1994). A key element in determining whether a community of interest exists is whether the asserted plant clericals "perform functions closely allied to the production process or to the daily operations of the production facilities at which they work." *Fisher Controls Co*., 192 NLRB 514 (1971); *Gordonsville*, supra.

In making that determination, my review of the relevant cases indicates that the crucial element in finding such an alliance with the production process, is significant contact with production employees. Thus, in cases where employees were found to be plant clericals, the Board consistently relies upon the presence of significant direct contact with production employees in finding functional integration with the production process and a sufficient community of interest. *Columbia Textile*, 293 NLRB 1034, 1037–1038 (1984); *Hamilton Halter*, supra; *Raytee Co*., 228 NLRB (1977); *Jacob Ash & Co*., 224

NLRB 74, 75 (1976); *Weyerhaeuser Co*., 132 NLRB 84, 85 (1961). On the other hand, where the Board finds employees not to be plant clericals, it consistently relies heavily on the absence of evidence of substantial contact with production employees to conclude that the asserted plant clericals do not share a community of interest with production employees and or are office clerical employees. *Aerospace Co.*, 331 NLRB 561, 572 (2000); *Mitchellace*, supra; *Cook Composites*, 313 NLRB 1105, 1108 (1994) (distinguishing *Hamilton Halter Co.*, supra on its basis); *Avecor Inc*., 309 NLRB 74, 75 (1992) (distinguishing *Columbia Textile*, supra); *Conchemco, Inc*., 182 NLRB (1970); *Wilder Mfg. Co.*, 173 NLRB 214 (1968), *Famous Barr Co*., 153 NLRB 341, 345 (1965).

In applying the principles of these cases to Patricia Palagonia, the record discloses that she performs various functions for Respondent, including, bookkeeping and filing, collecting personnel information from employees and preparing a folder for employees. She also stamps Christopher Palagonia's signature on payroll checks. These functions are clearly office clerical responsibilities and are not functionally related to the production process.

She also will take orders that comes in over the phone and will then bring the order out to the plant and give the order to a supervisor, or call the supervisor into the office and give him the order. Finally, she sorts out accounts payable files and places them back into the file cabinets. The latter function I also find to be essentially office clerical in nature. *Mosler Safe*, 188 NLRB 650, 651 (1971); *Famous-Barr*, supra.

However, her function of taking orders over the phone and distributing same to the production department has been held to be part of the production process. *Hamilton Halter*, supra, *Columbia Textile*, supra. However, as I have detailed above, those cases and others cited also found that the employees had direct contact with production employees in connection with that job function. There is no such evidence here, other than Patricia Palagonia's role in taking personnel information from employees when they are hired, which as noted is clearly an office clerical function, and not related to the production process.

While she does, at times, bring the order onto the production floor for processing, she has, insofar as this record discloses, no direct contact with unit employees. Her only contact is with supervisors in connection with this job function. This is insufficient involvement with the production process to warrant a community of interest finding. See *Aerospace*, supra, where an employee "on occasion" handed orders to mechanics, or placed orders in mechanics boxes. The Board concludes that the employee had "little interaction" with employees, and therefore such "minimal interface" with such employees does not provide the requisite community of interest. Here as noted, there is no evidence of any interaction with production employees, with regard to the production process.

Accordingly, based on the above precedent, I conclude that Patricia Palagonia does not share a community of interest with Respondent's unit employees, since she performs mainly office clerical functions, does not interact with such employees with regard to production matters, and works in a separate office not on or near the production floor. In such circumstances, she is not a plant clerical, and is excluded from the unit. *Aerospace*, supra; *Mitchellace* supra; *Cook Composites*, supra; *Conchemco*, supra; *Mosler Safe*, supra.

The Union also argues that Patricia Palagonia should be excluded from voting because she is a relative of management. The Board in *R & D Trucking Co*., 327 NLRB 531, 533 (1999), summarized applicable Board law on this subject:

> The Board has long hesitated to include the relatives of management in bargaining units because their interests are sufficiently distinguished from those of other employees: See *NLRB v. Action Automotive*, 469 U.S. 490, 494–495 (1985). The Board, however, does not exclude an employee simply because he or she is related to a member of management. *International Metal Products Co.*, 107 NLRB 65 (1953). Rather, the Board considers a variety of factors in deciding whether an employee's familial ties are sufficient to align his interests with management and thus warrant his exclusion from the bargaining unit. The greater the family involvement in the ownership and management of the company, the more likely the employee-relative will be viewed as aligned with management and hence excluded. See *NLRB v. Action Automotive*, supra. The Board utilizes an expanded community of interest test to determine whether relatives of owner-managers should be excluded from the unit. However, in cases where ownership is not an issue, the question is whether the relative enjoys a special status on the job because of their relationship to the nonowner manager. *Cumberland Farms Store*, 272 NLRB 336 (1984). See also *Allen Services Co*., 314 NLRB 1060, 1062–1063 (1994).

Here, Patricia Palagonia is the wife of Anthony Palagonia, a supervisor of Respondent, and the cousin of Chris Palagonia, Respondent's sole shareholder and owner. Additionally, Anthony is the brother of Joseph Palagonia, who is Respondent's general manager, who acts as a sort of cochief executive with Chris,[29] and another brother of Joseph and Anthony, Richie Palagonia is also a supervisor of Respondent. Thus, Patricia is a relative[30] of Chris Palagonia. and it need not be shown that she enjoys job related privileges, in order to find her interests aligned more closely to management, and therefore, that she does not share a community of interest with the unit employees. *Marvin Witherow Trucking*, 229 NLRB 412 (1977); *Parisoff Drive-In Market*, 201 NLRB 813, 814 (1973); *Caravelle Wood Products*, 200 NLRB 855, 856 (1972), enfd. 504 F.2d 1181, 1183–1188 (7th Cir. 1974).

However, although it is not essential that job related privileges be shown to demonstrate the lack of community of interest, *Parisoff*, supra, *Caravelle Wood*, supra, it is an important factor in assessing whether the employee shares a sufficient

[29] I note in that regard that when Respondent terminated Veras, as a result of a confrontation with Chris Palagonia, Chris, although the owner and president with full authority to terminate, reported the incident to Joseph and Respondent did not terminate Veras until Joseph conducted an "investigation" of the incident and recommended to Chris that Veras be fired.

[30] A relative is defined in the dictionary as "a person who is connected with another by blood or marriage," *Random House College Dictionary* p. 1113.

community of interest with other employees. *Luce & Sons, Inc*., 313 NLRB 1355, 1356 (1994) (sister of principal owner. Board relies on job related privileges not enjoyed by other employees to find employee ineligible); *Blue Star Ready Mix*, 305 NLRB 429, 430–431 (1991). (Grandson of sole owner. Board reverses hearing officer and find in the absence of special job related privileges, employee had sufficient community of interest with other employees.); *R & D Trucking*, supra (son-in-law of owner president. Excluded from unit because he enjoyed job related privileges not shared with other employees.).

Here, there is no evidence that Patricia Palagonia received any job related privileges as a result of her relationship to either Anthony or Chris Palagonia. While she does have responsibility of stamping Chris Palagonia's name on payroll checks, I do not view this as a job related privilege that would disqualify her from eligibility. Therefore, I do not find that her relationship to either Chris or Anthony Palagonia is sufficient by itself to warrant a finding that she lacks a community of interest with other employees. *Allen*, supra, *Blue Star*, supra.

However, I do note that my findings above that Patricia Palagonia is not a plant clerical, is based a finding that she does not share of community of interest with unit employees. In my view her status as a relative of the Palagonia's does reinforce and support that conclusion. I note that the Board observed in *Parisoff*, supra, that, where the relative of the challenged voter is but one of a "number of unrelated owners, an identity of interest between the voter and the corporations management may or may not be shown to exist. Where, however, all the owners are members of the same family and related to one another, as well as to the questioned employee, we believe it more likely that the business interests of the corporation will be synonymous with the interests of the family to which the employee belongs. His interests as a member of the governing family may well outweigh his interests as an employee of the corporation and, to that extent, his interests may be entirely different from the interests of the other employees whose sole stake in the corporation is that they work there." Id. at 813. The Board also noted the significance of the challenged individuals relative being active in the day-to-day management of the employer. The Board observed that in these circumstances, "it is a virtual certainty that such individuals would get a more attentive and sensitive ear to their day-to-day and long-range work concerns than would other employees. While this accessibility to management may not always result in easily identifiable special privileges or favorable working conditions, the fact that they have this peculiar access gives them a status and area of interest not shared by the rest of the employees." Id. See also *Caravelle Wood*, supra, where the Board found that wives and children of a family that was principally owned, controlled, managed, and supervised by members of that family were closely allied to management. The court affirmed the Board by observing that "blood is thicker than water," and that it is possible that the inclusion of the relatives in the unit would interfere with the "fullest freedom of other employees to engaged in the selection of their bargaining unit." 504 F.2d at 1187.

I recognize that these cases involve children or wives of owners, but the language therein appears applicable to the instant situation. Patricia Palagonia works for a company controlled and operated by the Palagonia family. Although she is married to Anthony, a nonowner, Anthony is a supervisor and a cousin of the owner and brother of Joseph, Respondent's general manager, who jointly runs the business with Chris. I also note, that although Patricia is not supervised by her husband, she is directly supervised by Joseph. In these circumstances, a strong argument can be made, as in *Parisoff*, supra, that in view of the role of the Palagonia family in managing and supervising Respondent's business, that Patricia Palagonia's status as a relative of the family makes it likely that her interest is more closely allied with management, than with those of her fellow employees. As set forth above, I do not find these facts alone sufficient to so conclude, in view of the lack of any evidence of job related privileges, but I am of the opinion that her status as a relative of the Palagonia family, is further supportive of my finding above that she is not a plant clerical and does not share a community of interest with unit employees.

I therefore conclude that the challenge to her ballot should be sustained.

The Union also contends that Patricia Palagonia should be excluded from the unit, as a confidential employee, since she is "involved in a close working relationship with an individual who decides and effectuates management labor policy and is entrusted with decisions and information regarding the policy before it is known by those affected by (such decision). *Intermountain Electric Assn*., 177 NLRB 1, 4 (1985). I disagree.

While the record discloses that Patricia Palagonia has access to the offices of Chris and Joseph Palagonia, who are Respondent's officials in charge of labor relations, such access is insufficient to confer confidential status. It must be shown that the employee played a substantive role in creating labor relations documents or making substantive decisions being recorded or has regular access to labor relations information before the Union or employees involved. *Inland Steel Co*., 308 NLRB 868, 877 (1992). Here, no evidence was adduced that Patricia Palagonia engaged in any of these functions. While she was authorized to stamp Chris Palagonia's name on payroll checks, this function has no relationship to any labor nexus, and is not an indication of confidential status. Therefore, I reject the Union's contention that she is a confidential employee.

However, as detailed above, because she is not a plant clerical and does not share a community of interest with production employees, I find that the challenge to her ballot should be sustained.

2. The objections

The objections filed by the Union have largely parallel the allegations of the complaint that I have decided above. In that I regard, I have found that Respondent committed numerous violations of Section 8(a)(1) of the Act, all of which took place within the critical period, between the filing of the petition and the election. These allegations include the unlawful granting of wage increases to employees, unlawful promises of benefit, threats to close, interrogations and engaging in surveillance of employees, and creating the impression that their union activities were under surveillance. These violations are more than sufficient to warrant setting aside the election. I so find.

Respondent's objections relate to the conduct of Jose Merced, a union official on the day of the election. The evidence presented revealed a stark difference between the testimony of Merced and Joseph Palagonia as to most of the relevant facts in dispute. Based on comparative demeanor considerations, as well as several other factors, I credit Merced's version of the events in question.

I note that one of the significant issues in dispute, is whether as testified to by Merced, he entered the premises in order to accompany two employees to vote, because they were denied entrance by Supervisor Londono, who in turn, cursed at Merced when he insisted on the employees being permitted to enter the premises in order to vote. Moreover, Palagonia testified that it was reported to him by DiBua that Merced sought to bring the employees into vote, but that DiBua had not denied entrance to the employees, but only to Merced. Further, according to Palagonia, both Londono and DiBua witnessed his alleged confrontation with Merced, wherein Merced allegedly refused to leave the premises and cursed at Palagonia, when Palagonia first confronted him.

Significantly, Londono did not testify, and DiBua testified about other matters, but was not asked about this incident. I find that Respondent's failure to call or ask these witnesses about this incident, gives rise to an adverse inference, that if called these witnesses testimony would be adverse to Respondent as to this incident. *United Parcel Co*., supra, *Ready Mix Concrete*, supra, *International Automated Machines*, 285 NLRB 1122, 1123 (1987) ("[W]hen a party, fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge.").

Such an adverse inference is particularly appropriate here, since Palagonia did not witness Merced's entrance into the plant, and his testimony that Respondent allowed the employees in but not Merced is based on his alleged report from DiBua. Thus, the failure of DiBua and Londono to corroborate Palagonia takes on even more significance in these circumstances.

Further, Palagonia's own testimony revealed significant inconsistencies. Initially, he never even mentioned that Londono was present during the incident, but only after Merced testified, did he recall on rebuttal that Londono was present. More importantly, initially Palagonia denied that he knew why Merced was in the plant, but only after questioning by me did he recall that DiBua had allegedly informed him of the reason.

Therefore, based on the foregoing, I have credited Merced's version of the incident. This testimony establishes that two employees informed Merced that Londono had denied them entrance to the plant in order to vote. Merced then walked with the employees to the back entrance, in order to assist them in gaining entrance to the facility. He was confronted by Londono who cursed at him and denied entrance to both Merced and the employees. Merced then opened the door, walked the employees into the plant, and directed them to the polling area. Londono followed Merced, and continued to curse at him. Merced then cursed back at Londono and said, "[D]on't talk to me that way."

Joseph Palagonia then came over and asked what Merced was doing in the plant? Merced explained that he wanted to make sure that employees could vote, since they were on the list. By that time, the employees had voted. Palagonia asked Merced to leave. Merced immediately left and did not curse at Palagonia. Merced also did not yell and scream outside the plant, after he left as Palagonia alleges.

Based on these factual findings, it is clear that the Union engaged in no objectionable conduct, and that Respondent's reliance on *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991), is misplaced. There, two union representatives refused to leave an employer's premises for 45 minutes, prior to an election, although repeatedly directed to do so by management representatives, and engaged in a "shouting match" in front of employees. The Board concluded that this major incident, wherein the union representatives, who had no legal right to be there, repeatedly and belligerently refused to heed requests of the employer's president to leave, amounted to objectionable conduct. The Board reasoned that this direct challenge to the employer's assertion of its property rights conveyed to employees that the employer was powerless to protect its own legal rights in a confrontation with the Union.

The facts here, however, are quite different. Merced when confronted by Palagonia and asked to leave the premises, immediately complied, since the employees had already voted. Thus, there was no refusal to leave belligerent or otherwise, and no conveyance to employees that the Employer was powerless to protect its legal rights. While Merced did have a confrontation with Londono, wherein he cursed at Londono within hearing of some employees, this confrontation was provoked by Londono's conduct in first refusing to allow the employees into the premises to vote, and by Londono's cursing at Merced for his conduct in assisting these employees in their right to vote. I note that in *Phillips*, supra, the Board pointedly observed that there is no evidence of any misconduct on the part of the employer to weigh against the misconduct on the part of the petitioner's agents. Here, there is clear misconduct on the part of Londono, a supervisor of Respondent, by denying entrance to the employees and cursing at Merced for his attempts to assist the employees in the exercise of their rights. Thus, Merced's conduct in cursing at Londono was clearly provoked, and does not warrant setting aside the election.[31]

Accordingly, based on the foregoing, I conclude that the objections of Respondent must be overruled.

3. Conclusions—Case 29–RC–9507

In sum, I have recommended that the challenges to the ballots of Uriel Londono and Patricia Palagonia be sustained, and the challenges to the ballots of Mario Arroyave, Leonard Pitter, Gibbs Saintvil, Frank Sigismondi, and Alexander Justi be overruled, and that their ballots be opened and counted.

[31] I note further, even if Merced's cursing at Londono was not provoked, I do not believe that such conduct was sufficient under *Phillips*, supra, to set aside the election, since when he was asked to leave by Palagonia, Merced immediately complied and left the premises.

Thereafter, the Regional Director shall issue a revised tally of ballots. If the revised tally reveals that a majority of ballots has been cast in favor of union representation, the Regional Director shall issue a certification of representatives.

If on the other hand, the revised tally does not show that the Union has received a majority of the votes, then I recommend that the election be set aside, and that a new election be ordered, due to the objectionable conduct of Respondent.

CONCLUSIONS OF LAW

1. The Respondent, Palagonia Bakery Company, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 348-S United Food & Commercial Workers International Union, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating its employees concerning their activities on behalf of or support for Local 348-S, United Food & Commercial Workers, AFL–CIO (the Union) interrogating its employees about events that are the subject of unfair labor practice proceedings, granting wage increases to employees in order to discourage its employees from supporting the Union, promising wage increases, increased vacation benefits, and other improvements in their terms and conditions of employment, to induce said employees to abandon their support for the Union, or to convince other employees to abandon their support for the Union, engaging in surveillance of the union activities of its employees, creating the impression that the union activities of its employees were under surveillance, and threatening its employees with closing of the facility, if employees supported or voted for the Union, Respondent has violated Section 8(a)(1) of the Act.

4. By discharging its employees Nelson Polanco and Andre Veras, more closely supervising its employees, changing the lunch hours of its employees, and by harassing its employees, because the employees engaged in activities on behalf of and supported the Union, Respondent has violated Section 8(a)(1) and (3) of the Act.

5. The above described unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

6. The Respondent has not otherwise violated the Act as alleged in the complaint.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminatorily discharged Andres Veras and Nelson Polanco, I shall recommend that the Respondent offer them immediate and full reinstatement to their former jobs or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them. All backpay provided shall be computed with interest on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact, conclusions of law, and the entire record, I issue the following recommended[32]

ORDER

The Respondent, Palagonia Bakery Co., Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees concerning their activities on behalf of Local 348-S, United Food & Commercial Workers AFL–CIO (the Union).

(b) Interrogating its employees about events that are the subject of unfair labor practice proceedings.

(c) Granting wage increases to its employees in order to discourage its employees from supporting the Union.

(d) Promising its employees wage increases, increased vacation benefits, or other improvements in their terms and conditions of employment, in order to induce its employees to abandon their support for the Union or to convince other employees not to support the Union.

(e) Engaging in surveillance of the union activities of its employees.

(f) Creating the impression that the union activities of its employees were under surveillance.

(g) Threatening its employees with closing of the facility, if its employees supported or voted for the Union in an NLRB election.

(h) More closely supervising its employees, changing the lunch hours of its employees, or harassing its employees, because said employees engaged in activities on behalf of or supported the Union.

(i) Discharging its employees because of their activities on behalf of or support for the Union.

(j) In any other manner interfering with restraining or coercing employees in the exercise of their rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Andres Veras and Nelson Palanco full and immediate reinstatement to their former positions of employment, or if their positions no longer exist, to a substantially equivalent position without prejudice to their seniority or other rights and privileges previously enjoyed.

(b) Make Andres Veras and Nelson Polanco whole for the discrimination against them in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the discharges of Andres Veras and Nelson Polanco, and within 3 days thereafter, notify them in writing that this has been done, and that evidence of the dis-

[32] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

charges will not be used as a basis for future personnel actions against them.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Brooklyn, New York facility copies of the attached notice marked "Appendix."[33] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representatives, shall be posted by the Respondent and maintained by it for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 19, 2000.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

IT IS FURTHER ORDERED, that the complaint be dismissed insofar as it alleges violations not found herein.

IT IS FURTHER ORDERED, that in Case 29–RC–9507, the challenges to the ballots of Uriel Londono and Patricia Palagonia be sustained and their ballots not be opened or counted. The challenges to the ballots of Mario Arroyave, Leonard Pitter, Frank Sigismondi, Alexander Justi, and Gibbs Saintvil are overruled and their ballots shall be opened and counted. Upon the issuance of a revised tally of ballots, if the Union is designated by a majority of the votes counted, the Region should issue of Certification of Representatives. If the Union has not been so designated, the election should be set aside, and a new election ordered.

[33] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate our employees concerning their activities on behalf of Local 348-S, United Food & Commercial Workers, AFL–CIO (the Union)

WE WILL NOT interrogate our employees about events that are the subject of unfair labor practice proceedings.

WE WILL NOT grant wage increases to our employees in order to discourage our employees from supporting the Union.

WE WILL NOT promise our employees wage increases, increased vacation benefits, or other improvements in their terms and conditions of employment, in order to induce our employees to abandon their support for the Union or, to convince other employees not to support the Union.

WE WILL NOT engage in surveillance of the union activities of our employees.

WE WILL NOT create the impression that the union activities of our employees are under surveillance.

WE WILL NOT threaten our employees with closing of the facility, if our employees support or vote for the Union in an NLRB election.

WE WILL NOT more closely supervise our employees, change the lunch hours of our employees, or harass our employees, because said employees engage in activities on behalf of or support the Union.

WE WILL NOT discharge our employees because of their activities on behalf of or support for the Union.

WE WILL within 14 days from the date of this Order, offer Andres Veras and Nelson Polanco full and immediate reinstatement to their former positions of employment, or if their positions no longer exist to a substantially equivalent position without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make Andres Veras and Nelson Polanco whole for the discrimination against them , plus interest.

WE WILL within 14 days from the date of this Order expunge from our files any reference to the discharges of Andres Veras and Nelson Polanco and within 3 days thereafter, notify them in writing that this has been done, and that evidence of the discharges will not be used as a basis for future personnel actions against them.

PALAGONIA BAKERY COMPANY, INC.